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CASES

ON

THE LAW OF SURETYSHIP

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

CRAWFORD D. HENING

PROFESSOR OF LAW IN THE UNIVERSITY OF PENNSYLVANIA

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

ST. PAUL

WEST PUBLISHING COMPANY

1911

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To

CHARLES BIDDLE

of the Philadelphia Bar

My Preceptor in the Law

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THE AMERICAN CASEBOOK SERIES

For years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

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the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

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treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly: principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

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If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical.

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and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Dean of the Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the George Washington University Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

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Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Joshua R. Clark, Jr., Assistant Professor of Law, George Washington University. *Subject, Mortgages.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, George Washington University. *Subject, Conflict of Laws.*

William C. Dennis, Professor of Law, George Washington University. *Subject, Public Corporations.*

James Brown Scott, Professor of Law, George Washington University; formerly Professor of Law, Columbia University, New York City. *Subjects, International Law; General Jurisprudence; Equity.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., February, 1911.

Following are the books of the Series now published, or in press:

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Conflict of Laws
Criminal Law
Criminal Procedure
Damages
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Pleading
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TABLE OF CONTENTS

PART I.

FORMATION.

CHAPTER I.

DIFFERENT FORMS OF SURETYSHIP.

Section		Page
1.	By Specialty	1
2.	Suretyship in the Form of Simple Contract	2
3.	Suretyship in the Form of Joint Liability	5
4.	Suretyship in the Form of the Contract of Indorsement or of Any Contract under the Law Merchant	9

CHAPTER II.

ESSENTIALS TO FORMATION OF SURETYSHIP BY SIMPLE CONTRACT.

1.	Suretyship in the Form of a Simple Contract and the Doctrine of Consideration	12
2.	Offer and Acceptance	18

CHAPTER III.

GENERAL ESSENTIALS TO THE FORMATION OF ALL CONTRACTS OF SURETYSHIP.

1.	Capacity—Personal Incapacity of Principal	60
2.	The Effect of Fraud	67
3.	Legality—Effect of Illegality	86
4.	The Effect of Duress	100
5.	Conditions Precedent	105

CHAPTER IV.

DISTINCTION BETWEEN SURETYSHIP AND OTHER FORMS OF CONTRACTUAL LIABILITY.

1.	Distinction between Suretyship and Other Forms of Contractual Undertaking, Chiefly with Respect to the Statute of Frauds	112
	I. Promises Made by the Defendant to the Debtor	112
	II. Promises Made by the Defendant to the Creditor	113
	(A) At the Time the Credit is Given or Debt Created, etc.	113
	(B) After the Original Credit is Given or Debt Created, etc.	131
	III. Promises Made upon the Extinction of the Original Debt—Novations	162
	IV. Assignment of the Original Debt by Promisee or Creditor	167
	V. Debts Created for Benefit of a Third Party	177
	VI. Actions for False Representations as to Credit of Another	188
	VII. Special Promise to Answer for the Miscarriage of Another Person	191
2.	Distinction between Suretyship and Guaranty	198

Digitized by Google

PART II.

THE EQUITABLE AND LEGAL RIGHTS OF THE SURETY.

Page

CHAPTER I.

THE SURETY'S EQUITY OF EXONERATION..... 200

CHAPTER II.

THE SURETY'S EQUITY OF REIMBURSEMENT..... 218

CHAPTER III.

THE SURETY'S EQUITY OF SUBROGATION..... 270

CHAPTER IV.

THE SURETY'S EQUITY OF CONTRIBUTION..... 325

PART III.

DEFENSES OF THE SURETY AGAINST THE CREDITOR OR PROMISEE.

CHAPTER I.

DEFENSES BASED ON THE JOINT NATURE OF THE CONTRACT—THE DEATH OF THE SURETY..... 362

CHAPTER II.

IMPOSSIBILITY OF PERFORMANCE—THE DEATH OF THE SURETY..... 369

CHAPTER III.

IMPOSSIBILITY OF PERFORMANCE—THE DEATH OF THE PRINCIPAL..... 391

CHAPTER IV.

PAYMENT OR PERFORMANCE BY PRINCIPAL..... 402

CHAPTER V

RELEASE OF PRINCIPAL..... 408

CHAPTER VI.

SET-OFF OR COUNTERCLAIM OF PRINCIPAL..... 412

Digitized by Google

CHAPTER VII.

Section Page

DUTY OF CREDITOR OR PROMISEE TO PURSUE PRINCIPAL BEFORE SUING SURETY OR GUARANTOR..... 425

CHAPTER VIII,

TRANSACTIONS OF CREDITOR OR PROMISEE WITH PRINCIPAL, GIVING RISE TO EQUITABLE RIGHTS OF SURETY SUBSEQUENTLY RECOGNIZED BY COURTS OF LAW.

1. Extension of Time to Principal..... 426
2. Surrender of Collateral..... 471
3. Variation by Creditor (or Promisee) and Principal of Original Agreement as to Which Surety Contracted..... 516
4. Effect of Connivance at Breaches of Principal's Duty, Not Amounting to Dishonesty..... 536
5. Neglect of Creditor to Utilize Means of Payment..... 538

CHAPTER IX.

TRANSACTIONS OF THE CREDITOR (OR PROMISEE) WITH SURETY.

1. Request of Surety to Creditor (or Promisee) to Sue Principal..... 543
2. Notice of Creditor (or Promisee) to Surety that Creditor (or Promisee) will Look Only to the Principal for Performance..... 554
3. Misinformation Given to Surety by Creditor as to State of Transactions between Principal and Creditor (or Promisee)..... 556

CHAPTER X.

EFFECT OF ABSENCE OF NOTICE TO SURETY OR GUARANTOR OF DEFAULT OF THE PRINCIPAL..... 560

CHAPTER XI.

CHANGE IN PERSONALITY OF THE PARTNERSHIP—PRINCIPAL..... 565

CHAPTER XII.

THE STATUTE OF LIMITATIONS..... 571

CHAPTER XIII.

DISCHARGE IN BANKRUPTCY..... 585

CHAPTER XIV.

EFFECT OF JUDGMENTS PLEADED IN BAR..... 587

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TABLE OF CASES

[CASES CITED IN FOOTNOTES ARE INDICATED BY ITALICS. WHERE SMALL CAPITALS ARE USED, THE CASE IS REFERRED TO IN THE TEXT]

	Page
Acers v. Curtis	332
Adams v. Jones	56
Alcock v. Hill	500
Alford v. Eglisfield	115
Ambrose v. Rowe	116
Angrove v. Tippett	232
Antrobus v. Davidson	217
Apgar's Adm'rs v. Hiler	233
Armstrong v. Warner	419
Ascherson v. Tredegar Dry Dock & Wharf Co	205
Austen v. Baker	117
Babcock, In re	202
Bailey v. Marshall	157
Balfour v. Crace	372
Bancrofte v. Willet	402
Bank of Washington v. Barrington	398
Banks v. Pike	418
Barker v. Bucklin	112
Batard v. Hawes	357
Baxter v. Jackson	134
Beardmore v. Cruttenden	201
Bechervaise v. Lewis	424
Berry v. Doremus	186
Bethune v. Dozier	524
Billington v. Wagoner	439
Bingham v. Mears	474
Board of Com'rs of Morgan County v. Branham	491
Boatmen's Sav. Bank v. Johnson	467
Bonser v. Cox	105
Boultbee v. Stubbs	429
Bourke v. Buxton & De Villiers	25
Brandon v. Brandon	271
Brown v. Garbrey	4
Brown v. Kidd	230
Buckley v. Turner	134
Buckmyr v. Darnall	119
Buckner v. Morris	239
Butcher v. Andrews	124
Butler v. United States	107
Cahill v. Bigelow	253
Calvert v. Gordon	381
Campbell v. Rothwell	504
Chaffee v. Jones	360
Cheney v. Thompson Hiles Co	11
Chipman v. Morrill & Webster	334
Cilley v. Colby	585
City of Philadelphia v. Reeves	6
Colby v. Farwell	197
Coles v. Strick	90
Collins v. Griffith	362
Compton v. Jones	170
Cooke v. ———	326
Cooper v. Gibbons	130
Copis v. Middleton	319
Cornwall v. Gould	221
Crace, In re	372
Craighead v. Swartz	227
Crears v. Hunter	36
Croft v. Moore	288
Cross v. Allen	578
Croughton v. Duval	543
Crum v. Wilson	587
Davidson v. Taylor	392
Davis v. Board of Com'rs of Stokes County	242
Davis v. Wells, Fargo & Co	55
Davis Sewing Mach. Co. v. Richards	52
Deaton v. Deaton	581
De Barry v. Withers & Peterson	171
Decker v. Pope	220
De Lecton v. De Suttona	218
Denison v. Gibson	86
Devers v. Ross	447
Director of Public Works v. Lewis	406
Dixon v. Steel	279
Dodd v. Whelan	369
Dodgson v. Henderson	464
Douglass v. Howland	588
Douglass v. Reynolds	56
Dover Stamping Co. v. Noyes	50
Downing v. Robinson	25
Durbin v. Kuney & Sayers	338
Dutchman v. Tooth	56
Dutt v. Administrator-General of Bengal	66
Eastwood v. Kenyon	112
Eddowes v. Niell	39
Ellesmere Brewery Co. v. Cooper	110

Digitized by Google

	Page
Evans v. McCormick	56
Everly v. Rice	483
Fanning v. Murphy	437
Farley v. Cleveland	178
Fegley v. McDonald	538
Fehr Brewing Co. v. Mullican	556
Fennel v. Mulcahy	137
First Nat. Bank v. Davis	300
First Nat. Bank v. Wood	550
Foster v. Halliman	116
Frank Fehr Brewing Co. v. Mullican	556
French v. French	15
Gargan v. School Dist. No. 15	394
Gaunt v. Hill	18
Gay v. Ward	383
Gieseke v. Johnson	240
Giltinan v. Strong	596
Glendinning, Ex parte	408
Glossup v. Harrison	219
Godfrey v. Rice	245
Goodell v. Bates	60
Graff v. Kahn	414
Gross v. Davis	348
Guild & Co. v. Conrad	159
Gwyn v. Patterson	109
Hall v. Capital Bank of Macon	459
Hamilton v. Watson	73
Harburg India Rubber Comb Co. v. Martin	140
Hargraves v. Parsons	174
Harley v. Stapleton's Adm'r	250
Harper v. National Life Ins. Co. of Montpelier, Vt.	526
Harris v. Brooks	554
Harrison v. Field	365
Harrison v. Lane	343
Hatchett v. Pegram	257
Hawkins v. Parker	131
Haydenville Sav. Bank v. Parsons	463
Hays v. Ward	425
Hazard v. Irwin	80
Hecht v. Weaver	389
Henry v. Daley	79
Henry v. Heldmaier	600
Hill v. Kelly	307
Hilliboe v. Warner	533
Hoffman v. Fleming	67
Hofheimer v. Losen	196
Holcombe v. Fetter	212
Hole v. Harrison	325
Holland v. Johnson	471
Hook v. White	97
Hooks & Wright v. Branch Bank at Mobile	574
Houlditch v. Milne	137
Hughes v. Lawson	138
Hughes-Hallett v. Indian Mammoth Gold Mines Co.	214
Huscombe v. Standing	100
Hutchinson v. Wright	470
Ingalls v. Dennett	221
Iona Sav. Bank v. Boynton	129
Israel v. Douglas	167
Jackson v. Cooper	535
Jarvis v. Wilkins	22
Johnson v. Mills	404
Jones v. Davids	306
Jones v. Ward	410
Jordan v. Tompkins	122
Jordan's Case	12
Kearnes v. Montgomery	193
Keate v. Temple	125
Kellogg v. Olmsted	435
Kemp v. Finden	328
Kent v. Canter's Ex'r	309
King v. Baldwin	209, 549
King v. Wilson	135
Kirby & Eccles' Case	2
Kirkham v. Marter	191
Knotts v. Butler	376
Labbe v. Bernard	339
Ladd v. Board of Trustees of Town 41 N., R. 14	81
Lakeman v. Mountstephen	122
Lamkin v. Palmer	155
Lamm & Co. v. Colcord	565
Lasher v. Williamson	417
Lawrence v. McCalmont	57
Lawson v. Wright	341
Laxton v. Peat	444
Lee v. Griffin	274
Lee v. Rook	200
Legate v. Marr	393
Lennox v. Murphy	47
Lent v. Padelford	42
Liddell v. Wiswell	357
Liquidators of Overend, Gurney & Co. v. Liquidators of Oriental Financial Corp.	449
Livingston v. Tremper	114
Lumpkin v. Mills	309
Lynn, etc., Co. v. Andrews	55
Macey, Henderson & Co. v. Heger	78
McGovern v. Rectanus	571
Mackreth v. Walmesley	351
McLemore v. Powell	432
Map v. Sidney	16
Marchman v. Robertson, Taylor & Co.	67
Marshall v. Hudson	255
Mason v. Hall	183
Mason v. Kilcourse	583
Matson v. Wharam	122

Digitized by Google

	Page
Mayhew v. Crickett	496
Meriden Britannia Co. v. Zingsen	163
Merrimack Bank v. Parker	402
Merritt v. Haas	508
Mersman v. Werges	516
Michael v. Allbright	356
Mines v. Sculthorpe	127
Monroe v. De Forest	476
Morrison & Co. v. Hogue	177
Morten v. Marshall	110
Mound v. Barker	99
Mt. Sterling Imp. Co. v. Cockrell	513
Moussa v. Loterijman & Co	425
Musgrave v. Dickson	272
National Exch. Bank of Lansingburgh v. Silliman	283
National Lead Co. v. Montpelier Hardware Co	482
Nelson v. Anderson	391
Nelson v. First Nat. Bank	573
North Ave. Sav. Bank v. Hayes	479
Norton v. Hall	261
O'Carroll, Case of	218
Odlin v. Greenleaf	251
Offord v. Davies	58
Oldershaw v. King	29
Orme v. Young	560
Orvis v. Newell	275
Overend, Gurney & Co. v. Liquidators of Oriental Financial Corp.	449
Page v. Krekey	82
Pain v. Packard	549
Paisley v. Freeman	190
Parsons & Cole v. Briddock	270
Payne & Wood v. Ives, Sargon & Mann	50
Peirce v. Garrett	298
Philips v. Astling	561
Polk Printing Co. v. Smedley	23
Pownal v. Ferrand	224
Primrose v. Bromley	364
Rainey v. Yarborough	326
Rawstone v. Parr	363
Rees v. Berrington	426
Remington Sewing Mach. Co. v. Kezertee	71
Renton, In re	408
Richardson v. Horton	394
Riddle v. Bowman	236
Riley v. Jarvis	5
R. L. Polk Printing Co. v. Smedley	23
Robbins v. Robinson	63
Robinson's Ex'rs v. Kenon's Ex'rs	339
Roe v. Haugh	162
Royal Ins. Co. v. Davies	378
Rozer v. Rozer	117
Ruble v. Norman	405
Ruggles v. Bernstein	599
Saline County v. Sappington	3
Sanderson v. Aston	536
Saunders v. Churchill & Smith	200
Savage v. First Nat. Bank	21
Saymond v. Gent	369
Scanland v. Settle	209
Shinn v. Budd	302
Sir Daniel O'Carroll, Case of	218
Skip v. Huey, Wilcox & Edwards	485
Skip v. Huey, Wilcox & Edwards	429
Sloo v. Pool	330
Smith v. Schneider	268
Smith v. Shelden	445
Smith v. Wheeler	265
Smith Bros. & Co. v. Miller	128
Somersall v. Barneby	55
Springer v. Toothaker	511
Stephenson v. Taverners	213
Stewart's Adm'r v. Parker	461
Stone v. Compton	68
Stonehouse v. Bodvil	116
Swan v. Nesmith	131
Swift v. Beers	98
Symmons v. Want	14
Tanner v. Gude	9
Tarleton v. Tarleton	252
Taylor v. Farmers' Bank	321
Taylor v. Heriot	209
Taylor v. Scott	533
Thayer v. Daniels	266
Thompson v. Bowne	549
Tinsley v. Oliver's Adm'r	219
Toles v. Adee	100
Townsend v. Riddle	545
Townsend v. Whitney	292
Trent Nav. Co. v. Harley	435
Upton v. Vail	188
Voss v. German-American Bank of Chicago	541
Wakefield Bank v. Truesdell	437
Walther v. Merrell	140
Ward v. Coggin	115
Ware, Ex parte	320
Warren v. Crabtree	94
Waterman v. Clark	412
Watkins v. Perkins	118
Westhead v. Sproson & Piper	18
Whelan, In re	369
Whitcomb v. Whiting	576
White v. Rintoul	149
Whiting v. Clark	575
Williams v. Leper	135
Wilmington, C. & A. R. Co. v. Ling	73
Winn v. Sanford	61

Digitized by Google

	Page
Winslow v. Parkurst's Heirs....	368
Wood v. Farmer.....	7
Woodcock v. Oxford & W. R. Co.	531
Wright v. Smith.....	186
Wulff & Billing v. Jay.....	487
Wynne v. Hughes.....	34
Year Book, 33 Edw. I.....	1
Year Book, 9 Hen. V, Fol 14, Pl. 23	113
Year Book, 12 Hen. VIII, Fol. 11, Pl. 3.....	113
Young v. Cleveland.....	515
Zeigler v. Hallahan.....	519
Zimmerman v. Judah.....	530

Digitized by Google

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CASES ON SURETYSHIP

PART I

FORMATION

CHAPTER I

DIFFERENT FORMS OF SURETYSHIP

SECTION 1.—BY SPECIALTY

YEAR BOOK, 33 EDW. I.

(Michaelmas Term, 1305. Rolls Edition, p. 86.)

A. and B., executors, brought a writ of debt against three persons by different præcipes. The one who was the principal debtor came into court, and said that they could not have an action for that he whose executors they were had ordered him to pay that debt to one R. to whom he was bound in a sum of money, and had granted that he should be quit of that debt to him and to his heirs and executors; and he put forward a deed which witnessed it. The executors denied the deed; wherefore it remained in the court. The executors nevertheless sued against the others as sureties and principal debtors and they came into court.

Herle.[1] You cannot have an action, for he who is the principal debtor has put forward the deed of him whose executors you are, to bar you of the action; which deed you have denied, and it is not yet tried; and we pray judgment if, before this deed be tried, we ought to answer about this debt: for let us suppose that we answer now, and perchance the debt be recovered against us, and then the deed be tried and be found good, and thus the principal acquitted, &c., then they would recover against us whereas the principal was acquitted, which would be contrary to law; wherefore, etc.

[1] A Serjeant at law, attorney for the defendant. See Foss' Lives, 344.

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Passeley.[2] If you ought not to answer, and afterwards the deed be found null, whereupon he would be condemned in the debt, and if he were not able to pay, by reason whereof we should sue you, you would again show that deed, wherefore, etc.

Herle said: No, because they were not party to the deed.

HENGHAM.[3] We must inquire about this order to pay; for if it be good, you are all quit; if otherwise, you are all bound to the debt by the obligation; wherefore we must first know if the obligation is your deed, etc.

Herle admitted the obligation.

HENGHAM. Then stay until the order to pay be tried. Note, by Warr. that, if the deed be found null, as not being the deed of the testator, they will all, without any other answer, be condemned in the debt.[4]

SECTION 2.—SURETYSHIP IN THE FORM OF SIMPLE CONTRACT

KIRBY & ECCLES CASE.

(Court of King's Bench, Trinity Term, 1589. 1 Leonard, 186, part 1.)

In an action upon the case the plaintiff declared, Quod cum quædam communicatio fuisset betwixt the plaintiff and one Cowper, that Cowper should mast certain hogs for the plaintiff, the defendant did promise, that in consideration, that the plaintiff promised give unto the defendant three shillings and four pence for the fatting of every hog, that the said hogs should be redelivered to him well fatted; to which promise and warranty, the plaintiff giving faith, delivered to the said Cowper one hundred and fifty hogs to be masted; and that one hundred of them were delivered back, but the residue were not.

[2] A Serjeant at law, attorney for the plaintiff. See Foss' Lives, p. 502.

[3] Ralph de Hengham, Chief Justice of the Common Pleas, 1273–74 to 1290, 1300 to 1309. Foss' Lives, 338.

[4] "The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument that any consideration should appear on it." Best, C. J., in Morley v. Boothby, 3 Bingham, 107 (1825).

The earliest forms of suretyship by specialty were joint contracts, as in the principal case. Suretyship by specialty has, however, not infrequently been in the form of a several contract. Douglass v. Howland, 24 Wend. (N. Y.) 35 (1840), post, p. 588; Johnson v. Baker, 4 B. & Ald. 440 (1821); Elliott v. Mayfield, 4 Ala. 417 (1842); In re Silvester, 1 L. R. (Chancery) 573 (1895).

In Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62 (1893), the court said: "The defendants Peterson and Bergstrom raise the objection in limine that

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It was moved That here is not any consideration for which the defendant should be charged with any promise: but it was argued on the other side, That the promise was the cause of the contract, and being made at the time of the Communication and contract, should charge the defendant; but if the promise were at another time, it should be otherwise. There was a case lately betwixt Smith and Edmunds. Two merchants, being reciprocally endebted the one to the other, agreed betwixt themselves to deliver all their Bills and Bonds into the hands of one Smith who promised that he would not deliver them to the parties until all accounts were ended betwixt them; and yet he did deliver them, and for that an Action brought against him was adjudged maintainable: yet there was not any consideration,[5] nor was it material, for the action is grounded upon the Deceit, and so is it here, upon the warranty: and of that opinion were CLENCH and WRAY, Justices; but GAWDY was of a contrary opinion.

SALINE COUNTY v. SAPPINGTON et al.

(Supreme Court of Missouri, 1876. 64 Mo. 72.)

Error to Saline Circuit Court.

SHERWOOD, Judge, delivered the opinion of the court.

Action on an instrument executed by Sappington as treasurer of Saline county, and by the other defendants as his sureties. The instrument was not a bond in consequence of lacking the word "seals" in the body thereof.

Breaches were set out, reformation of the instrument so as to make it a specialty, and judgment for the penalty and execution, etc., were asked for. The defendants successfully demurred. There was no insufficiency in the petition. A mere prayer for relief is not demurrable. The instrument sued on was well enough without a seal; was good as a common-law contract, made on adequate consideration (Henoch v. Chaney, 61 Mo. 129), therefore no necessity existed for reformation, and the prayer therefor may be rejected as surplusage.

the bond of indemnity shows on its face that it was executed after the contract was made, and is without consideration to support it. It is a sufficient answer to this that the instrument is a covenant by which they have bound themselves under seal, which conclusively imports a consideration."

See the opinion of Hare, J., in Shackamaxon Bank v. Yard, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521 (1891).

In Fallowes v. Taylor, 7 Term R. 475 (1798), Lord Kenyon, C. J., said: "The want of a consideration to a bond affords no ground of objection; and if there were anything illegal in this consideration the defendant should have pleaded it."

The entire common law as to specialties having been changed in some American jurisdictions by statute, a surety cannot become bound by specialty within such jurisdictions without consideration. Bullen v. Morrison, 98 Ill. App. 669 (1901).

[5] In the sense of positive advantage to the defendant.

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The mere prayer for relief does not constitute a distinct cause of action, but only seeks a particular remedy. McClurg v. Phillips, 49 Mo. 315.

Judgment reversed, and cause remanded; the other judges concur.[c]

BROWN v. GARBREY.

(Court of Common Pleas, Trinity Term, 1588. Gouldsb. 94.)

Brown recovered against Garbrey in an Assumpsit, and thereupon Garbrey brought a Writ of Error, and assigned for error, that there was no Consideration; for the Declaration was, that whereas there was a communication between Brown and a woman, for mariage between them, that the Father of Brown had promised to the Wife, that if she would marry his Son, he would make a Feoffment of his land to the use of himself for life, and after to the use of them two in tayl, the remainder, &c. and that Garbrey assured to the Wife in consideratione præmissorum, that if the Father did not doe so, then he would give the Wife a hundred pound; ac licet, the Father did not give to them in tayl, secund. agreament. prædict. yet Garbrey refused, &c.

And Cook moved that this should be no Consideration; for the communication of Mariage was not by him, but between strangers to him; but if the father had assumed in consideration of Mariage, then that should have been good against the Father; but against Garbrey it is no otherwise than as if one promise to you to Enfeoff you, and I say that if he doe not so, then I will give you a hundred pound, this is without consideration, and so here. But the Justices held the contrary, and that the consideration is good; for in consideratione præmissorum, is in consideration of the Mariage, as well as of the refusall of the Father; and allso it was alleged, that Garbrey was Cosen German to Brown, and therefore, &c.

ANDERSON. If a communication between two, and a Father promise to make a Joynture, and a stranger say that if the Father will not, then he will doe it, this is a good consideration; and there is no necessity to be so curious in the consideration; for that is not traversable.

But Cook sayd, that if it be Executory, then it is traversable. Another error Cook assigned, because they had not alleged a not performance in the Father; for the promise of the Father was to make a Feoffment to the use, &c. and they averre that allthough that he did not make a gift in tayl, which cannot be the same thing which the Father

[c] Hence an instrument, "in form a bond but without seals, * * * is a valid contract obligation if executed upon sufficient consideration and delivered to take effect as security." Bank v. Briggs' Assignees, 69 Vt. 12, 37 Atl. 231 (1894).

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should doe; for an estate to use in tayl, and a gift in tayl is not all one. But the Justices held it good, for by the Statute of 27 H. VIII the use is executed, and so the estate executed. Also the Declaration was that he had not made a gift in tayl secundum agreamentum prædictum.

But Cook moved that it should not be good, for if a man be bound to make an estate to another in the per, and he make it in the post, this is no performance, and here by the Statute he is in, in the post, and the not performance is alleged to be, because he did not in the per, and saith, that he which is in by the Statute, shall not vouch, for he is in, in the post, and he cited Winters Case, which was not denyed; but Peryam said, that considerations in actions upon the Case, and Conditions, are not all one.

SECTION 3.—SURETYSHIP IN THE FORM OF JOINT LIABILITY.

RILEY v. JARVIS et al.

(Supreme Court of Appeals of West Virginia, 1896. 43 W. Va. 43, 26 S. E. 366.)

Error to Circuit Court, Taylor County.

Assumpsit by Oscar F. Riley against Claude S. Jarvis and another. There was a judgment for plaintiff, and defendants bring error. Reversed.

BRANNON, Judge. Oscar F. Riley brought assumpsit in the Taylor county circuit court, and, judgment having been rendered against the defendants, Claude S. Jarvis and Granville E. Jarvis, they bring the case here.

The defendants demurred to the declaration and each count, and the court sustained the demurrer and gave judgment upon such demurrer upon all the counts except the first, and overruled it as to that count. The first count is the ordinary indebitatus assumpsit for goods, wares, and merchandise sold and delivered. The second is a special count, alleging that defendants and plaintiff made a written contract whereby Claude S. Jarvis agreed to pay individually, out of his own funds, to plaintiff, $10 per month, so long as they should continue in business together, or so long as the plaintiff should run the business in a businesslike and profitable manner, as part consideration for his time and labor about the business; that Granville E. Jarvis executed the writing and bound himself equally with Claude S. Jarvis, as security for him; and that the plaintiff, under the writing, carried on the business for a certain specified time, for which the defendants became bound to pay him $120, but they refused and failed to do so,

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etc. The third count was indebitatus assumpsit, containing a clause for goods and chattels sold, horses sold, work done, and material therefor provided, and other common clauses.

Appellants' counsel contends that there is a misjoinder of counts, and this on the idea that the liability stated in the second count is against Granville E. Jarvis only as surety, while other counts charge both Claude S. and Granville E. Jarvis with joint liability. I think there is nothing in this contention. Where two parties, by written obligation, bind themselves to pay another a given sum, though one sign with the word "surety" annexed to his name, or it be stated in the writing that he is surety, or binds himself as surety, both are equally bound as principals, so far as it concerns the creditor's right, as they both promise to pay him. It is a mere memorandum to evidence the fact that the one is surety as between the parties bound. Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68; Id., 6 Mass. 519; Humphreys v. Crane, 5 Cal. 173; opinion. Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254; Wilson v. Campbell, 1 Scam. (Ill.) 493. Where the surety does not sign the note, but puts a memorandum at its foot that he binds himself as surety for the payment of the note, it is the same. The obligation is joint and several. Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68; Wilson v. Campbell, 1 Scam. (Ill.) 493. I do not think the declaration need have noticed the suretyship feature, as its omission would have been no variance, because immaterial; and, being in the declaration, it does not have any effect, the count charging a joint liability notwithstanding its presence. * * *[7]

CITY OF PHILADELPHIA v. REEVES et al.

(District Court of Philadelphia, 1864. 5 Phila. 357.)

SHARSWOOD, P. J. This is a demurrer to a plea of abatement of nonjoinder of another defendant. The instrument sued on, and which is set forth on oyer, is a lease in which Fort Ihrie was tenant and defendants his sureties. The covenant sued upon, however, is unquestionably joint, unless the insertion of the word "sureties," describing the defendants, renders it joint and several. Indeed, it would not help the plaintiff to construe it to be joint and several, as he has sued two of the contractors, which he cannot do where there is a joint and several contract by them. The acute and ingenious counsel of defendant contended, however, that these words by construction of law made two separate covenants, one a several one with Fort Ihrie as tenant and principal, and another accessory joint contract with the defendants as his sureties. He produced no authority, however, in support of this

[7]Only so much of the case is given as relates to the question of joint obligation.

Accord: Clark, Administratrix, v. Dane, 128 Ala. 122, 28 South. 960 (1900).

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novel position, and we think it cannot be sustained upon any principle of construction.

Judgment for defendants.[8]

WOOD v. FARMER.

(Supreme Judicial Court of Massachusetts, 1908. 200 Mass. 209, 86 N. E. 297.)

KNOWLTON, C. J.[9] The defendant filed a paper which is entitled: "Motion to Dismiss and Demurrer." It begins by stating that six other persons whose names are given are necessary parties defendant in the suit, and avers that therefore the defendant should not be held to answer, and the writ should be abated and the action dismissed. This is an answer in abatement, and it properly raises the first question in the case. Then follows, in the same paper, without waiving the preceding answer, a demurrer setting up these and other facts as grounds of the demurrer. No question is raised by either party on the pleadings.

The question as to nonjoinder arises under the third clause of the contract declared on, which is in these words: "In consideration of the premises the guarantors jointly guaranty the payment of said twenty-five thousand dollars, or any part thereof, pro rata, and also that the Securities Company will fully and completely perform and fulfill the terms of the agreement with the parties of the first part." The defendant is one of seven guarantors who signed the contract. Is the undertaking contained in this clause joint or several? The words "pro rata" are all that create a possibility of a doubt about it. Without these words, even if the word "jointly" were omitted, it would be unquestionably a joint undertaking. Bartlett v. Robbins, 5 Metc. 184; Donahue v. Emery, 9 Metc. 63.

The word "jointly" emphasizes its character by an express statement. Do the words "pro rata" change its meaning and legal effect? We think they do not. See Bartlett v. Robbins, ubi supra; Penniman v. Stanley, 122 Mass. 310. It is difficult to understand their exact significance. As here used they are not proper to characterize several action as distinguished from joint action. They more naturally refer to the proportion of the whole amount that the guarantors are to pay jointly, if payment of only a part should be required under the

[8] In many states joint contracts are modified by statute into joint and several contracts. See post, Part III, "Defenses of the Surety against the Creditor or Promisee," Chapter I, "Defenses Based on the Joint Nature of the Contract—The Death of the Surety." See Stimson's American Statute Law, § 4113; Code Civ. Proc. Cal. §§ 414, 989; Rev. Laws Minn. 1905, § 4282.

[9] The statement of facts has been omitted, a sufficient statement being in the opinion.

Those portions of the opinion dealing with the question whether the plaintiff has a right of action as assignee and the further question whether there was any illegality in the transaction have been omitted.

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guaranty. The first thing provided for is a guaranty of payment of the whole sum of $25,000, and the second thing provided for is the payment of any part thereof, pro rata. It seems to us to be an inapt expression used to indicate a payment of any proportional part of the whole sum in the same manner and upon the same terms as payment of the whole would be made. We think it was not intended to change the whole character of the undertaking from what is expressly said to be a joint guaranty to a several guaranty by each person of only a fractional one-seventh of the whole sum of $25,000 or any part thereof.

The next question is whether the letter written to the defendant by Abbott and White, after the contract was signed and before its delivery, changed its legal effect. We think it plain that it did not. The letter did not suggest a change in the contract, much less did it purport to make a change. It told of the advice of counsel that each of the guarantors was liable for only one-seventh of the whole amount, and it expressed the concurrence of the writers in that advice and opinion. There is nothing to indicate that the Commonwealth Securities Company, or either of the six joint guarantors other than the defendant, had any knowledge of the letter. It was a mere expression of opinion as to the legal effect of the contract in writing. This opinion and the expression of it to one of the seven guarantors did not change the contract, or affect the legal rights of any of the parties. The action cannot be maintained without a joinder of the other necessary parties. The same considerations apply alike to both counts of the declaration.

The presiding judge sustained the demurrer and ordered judgment for the defendant. The grounds of his decision are not stated in the report. Very likely they were those which we have already considered. * * *

The pleadings and the form of the report leave us doubtful in regard to the order that should be entered. The case was heard upon issues of law, and from the fact that the judge ordered judgment for the defendant after sustaining the demurrer, and then reported the case, we infer that the plaintiff did not desire to amend his writ. There was no formal joinder of an issue of law upon the answer in abatement. On a decision of such an issue against the plaintiff, or upon a similar decision on the demurrer, judgment for the defendant would follow, unless the plaintiff moved to amend his writ. The entry is to be judgment for the defendant, unless within 15 days, the plaintiff shows cause for some other disposition of the case in the superior court.

So ordered.

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SECTION 4.—SURETYSHIP IN THE FORM OF THE CONTRACT OF INDORSEMENT OR OF ANY CONTRACT UNDER THE LAW MERCHANT

TANNER v. GUDE.

(Supreme Court of Georgia, 1897. 100 Ga. 157, 27 S. E. 938.)

Complaint on note. Before Judge Reid, City Court of Atlanta. January Term, 1896.

SIMMONS, Chief Justice. Upon a promissory note for $1,369.13 and interest, due August 29, 1895, Gude, on December 10, 1895, brought suit against Collins, the maker, and Tanner, payee and indorser, alleging that Tanner had indorsed it to him for value. Tanner filed a plea alleging: He was a mere surety on the note, which fact was known to the plaintiff. On September 16, 1895, after the note fell due, the plaintiff, then the holder and indorsee, agreed with Collins, the maker, that if he would pay him the accrued interest on the note to its maturity and future interest for ninety days in advance, he would extend the note to December 1, 1895, and not bring suit thereon previous to that date. Collins paid said sums on September 16, 1895, amounting to $247, and the agreement between him and the plaintiff was fully executed. Defendant had no knowledge of this arrangement, and it was consummated without his consent. Nor did plaintiff make any demand of defendant to pay the note at maturity. At the time of said arrangement Collins was solvent, and would have paid the note if the plaintiff had not agreed to wait, but he has since become insolvent. By reason of this conduct on the part of plaintiff, defendant's risk has been increased, and he has been injured and exposed to greater liability, and by reason of the same he is discharged from any liability on the note. The court, on demurrer, ordered that this plea be stricken, unless the defendant would amend by denying the allegation that he indorsed the note for value to the plaintiff after its date. This was not done, and the plea was stricken. To this ruling Tanner excepted.

We think the court erred in striking the plea. The contention of counsel for the defendant in error was, that if the indorsement was for value, the indorser was not a surety, and therefore was not discharged by the extension. It is true there is a distinction between an ordinary indorser and one who is merely a surety; but a contract of suretyship is necessarily included in every unqualified indorsement of a negotiable instrument (2 Dan. Neg. Inst. §§ 1303, 1305; McCay, J., in Freeman v. Cherry, 46 Ga. 16); and the principle which protects

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sureties from any act of the creditor tending to injure the surety, or increase his risk, is applicable as well to indorsers for value as to those whose indorsement is for accommodation merely. The rule has been stated thus: "If the defendant is not the principal and absolute debtor, but is a party collaterally and contingently liable, upon the principal debtor's default, as is the * * * indorser, he may set up in defense any valid agreement between the holder of the security and the principal debtor, founded upon an adequate consideration and made without his concurrence, whereby a new and further time of payment is given to the principal debtor." 2 Greenl. Ev. § 202. See, also, Story, Prom. Notes, §§ 412–414; 2 Am. & Eng. Enc. of Law, p. 386; 1 Brandt, Suretyship, § 2; Id. §§ 127, 359. In the case of Stallings v. Johnson, 27 Ga. 564, where an indorser was held discharged by an agreement between the maker and the holder of a note for an extension of the time of payment, the indorser was, as in the present case, the payee of the note; and the contrary not appearing, the presumption is that he was an indorser for value, such being the prima facie import of the indorsement. Freeman v. Cherry, supra. We think the decision in Stallings v. Johnson controls the present case. Such an agreement as the one here referred to, between the holder of a note and the maker, precludes an indorser from availing himself of the right which he would otherwise have of paying the debt and proceeding at once to enforce his demand against the maker; and it would be manifestly unjust to allow the indorsee to thus tie the hands of the indorser until after the insolvency of the maker, and then hold the indorser liable; and this is so whether the indorser has received a consideration for his indorsement or not.

Judgment reversed. All the Justices concurring.[10]

[10] Thus the acceptor of a bill of exchange may be in fact a surety and become entitled to be treated as such. Davies v. Stainbank, 6 De G., M. & G. 679 (1855).

"Their Lordships see no reason to doubt that the liabilities inter se of the successive indorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well-established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as indorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. It is in accordance with that rule that the drawer of a bill is made liable in relief to the acceptor, when the facts and circumstances connected with the making and issue of the bill sustain the inference that it was accepted solely for the accommodation of the drawer. Even where the liability of the party, according to the law merchant, is not altered or affected by reference to such acts and circumstances, he may still obtain relief by showing that the party from whom he claims indemnity agreed to give it him; but in that case he sets up an independent and collateral guarantee, which he can only prove by means of a writing which will satisfy

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CHENEY v. THOMPSON HILES CO.

(Supreme Court of Georgia, 1897. 101 Ga. 370, 28 S. E. 1017.)

Complaint on note. Before Judge Harris, City Court of Floyd County, December Term, 1895.

LUMPKIN, P. J. The Thompson Hiles Company brought an action against Phil Daniel and Abe Jackson as makers, and A. D. Cheney as indorser, of a promissory note. Subsequently the plaintiff filed an amendment in these words: "And now comes Thompson Hiles Company and strikes the name of A. D. Cheney as indorser, and sues A. D. Cheney as surety." Thereupon the defendant Cheney filed a plea in the following language: "And now comes the defendant, and says he was indorser on the note, and not surety." The note in question was signed by Phil Daniel and Abe Jackson, and was payable to the order of A. D. Cheney, who indorsed his name across the face of the note, and thus transferred it to the plaintiff. If he had written his name across the back of the note, there could be no possible question that he was in the strictest sense an indorser of the paper. That instead of so doing he wrote his name across the face of the paper makes no substantial difference. The suit was therefore properly brought in the first instance against Cheney as indorser, and the change made in the plaintiff's pleadings was not only unnecessary, but inappropriate.

Inasmuch, however, as the record discloses that there was no meritorious defense of which the defendant Cheney, in either relation to the paper sued on, could have availed himself, the judgment against him was in accord with the substantial justice of the case. Nevertheless, it was his strict legal right to be sued and to have a judgment against him in the exact capacity in which he actually contracted. Direction is therefore given that the declaration be restored to its original form by entering an order striking the plaintiff's amendment thereto. A precedent for this course is to be found in the case of Ware v. City Bank of Macon, 59 Ga. 840.

Judgment affirmed, with direction. All the Justices concurring.

the statute of frauds." Macdonald v. Whitfield, L. R. 8 App. Cases, 744 (1883), per Lord Watson.

"Was this the payment of a valuable consideration? Battin had received Fairman's notes in exchange for his own notes of like sums. Every one of his notes in Fairman's hands had to be indorsed by Fairman, and was held by the banks and others on the credit of both their names. Both were liable to the holders, and as to them and all other parties Battin stood as principal debtor, and Fairman as his surety; but, as between themselves, Fairman was the principal debtor, and Battin the surety. A surety may consent to stand as drawer as well as indorser, and whilst the law will treat them as sustaining the relations they have assumed on the paper they have issued, equity will, in adjusting their mutual rights and liabilities as between themselves, look at the essential truth of their relation, and make him who really is the principal debtor indemnify him who really is the surety." Taylor's Appeal, 45 Pa. 81 (1863).

On guaranty operating as an indorsement, see note 10 H. L. R. 186.

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CHAPTER II

ESSENTIALS TO FORMATION OF SURETYSHIP BY SIMPLE CONTRACT

SECTION 1.—SURETYSHIP IN THE FORM OF A SIMPLE CONTRACT AND THE DOCTRINE OF CONSIDERATION

JORDAN'S CASE.

(Court of King's Bench, Michaelmas Term, 1536. Year Book, 27 Hen. VIII, fol. 24, pl. 3 [Yetsweirt, London, 1597].)

In the King's Bench one Jordan brings writ on his case. And recites in the writ that whereas the plaintiff had one Tatam in execution in the County Court for a certain debt recovered against him and the defendant assumpsit super se to the plaintiff that if the said plaintiff would discharge the said Tatam from execution he would pay the debt to the plaintiff at such a day if the said Tatam did not pay it to him before: and he shows how he discharged the said Tatam from execution, and that the said Tatam did not pay before the day. Wherefore &c. The defendant traverses the promise, and upon that fact they were at issue, and at nisi prius in London the plaintiff gives in evidence that the defendant came to the wife of the plaintiff, the plaintiff being absent, and promised his wife that if the plaintiff, her husband, would discharge the said Tatam from execution, he would pay the debt on such a day to her husband if Tatam did not pay it before that date, then the plaintiff comes home and his wife informs him and he agrees to the promise and thereupon he discharged the said Tatam from execution. The defendant says that this evidence is of no consequence because the wife cannot be party to such a promise without the preceding command of her husband or without an agreement in advance, and so the promise is void and the agreement of the husband afterwards cannot make it good. And it seemed to the justices at nisi prius that the exception was not good. Wherefore the defendant took a bill of exceptions; and one of the justices seals it and then the verdict is given for the plaintiff, and now at a day in bank the defendant alleges the matter aforesaid in arrest of judgment.

Knightly (arguendo): You ought not to go to judgment, for this promise to the wife of the plaintiff, he being absent, is not good * * *[1] For if I have one in execution and come to his

[1] The remainder of the argument on the question of the agency of the wife is omitted.

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guardian and say to him that he shall discharge him who is in execution and he discharges him, I shall have action of debt against the guardian.

Quod TOTA CURIA negavit, and that the law is clearly contrary. Wherefore for this reason that is no plea.

Knightly (arguendo): Still I think that this action does not lie for if he could have had action of debt on this matter still he shall not have action on his case for that remedy he cannot have unless he has no remedy by any other writ.

TOTA CURIA. That is not so; for in many cases one shall have action on his case where he can have other remedy; wherefore on this account it is good.

BROOK.[2] It seems that the promise to the wife of the plaintiff, he being absent was good until the husband disagreed. * * *[3] And besides, as to that which has been said, that the plaintiff shall have writ of debt and not this action, I am of a contrary opinion, for I understand that one shall not have writ of debt except where there is a contract, for the defendant has not quid prò quo but the action is only based upon the promise, which sounds merely in covenant, and if it was by specialty the plaintiff would have action of covenant, but there being no specialty, as it seems to me he has no other remedy unless action on the case. And a case was adjudged during the time that I have been judge here which was this: That a stranger comes with a man to a baker of London and says to the baker, deliver to this man as much bread as he wants, and if he does not pay you, I will pay you; and the baker delivers certain bread to the man, and then the man does not pay the baker wherefore the baker brings his action on his case on the special matter against the stranger, and the stranger demurred to his action, and adjudged clearly that the action lies, and the baker recovered: so it seems here. Wherefore &c.

SPELMAN.[4] To the same effect.[5]

PORT.[6] To the same effect. * * *[7]

FITZ-JAMES, Chief Justice. * * * Now whether he shall have action of debt or this action; and it seems to me that he shall not have action of debt; for here there is not any contract nor has the defendant quid

[2] Probably Richard Brooke, though no mention of him as a judge of the King's Bench is made by either Foss or Dugdale, who record that he was simultaneously Chief Baron of the Exchequer and one of the Justices of the Common Bench during this period.

[3] The remainder of the opinion on the agency of the wife is omitted.

[4] John Spelman appointed Associate Justice of the King's Bench, 1532 obt. 1544.

[5] The opinion discusses only the procedural question of the bill of exceptions and the question of the agency of the wife.

[6] John Port was appointed an Associate Justice of the King's Bench prior to 1533, the exact date being, according to Foss, uncertain.

[7] This opinion deals exclusively with the power of the wife to bind the husband.

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pro quo; wherefore he has no other remedy than only action on his case. As if a stranger in London buys a piece of cloth and I say to the merchant, if he does not pay you on such a day, I will pay, here there is not a contract between the merchant and myself and he will not have action of debt against me. So it is if one is arrested for debt and I say to the creditors, are you content to let him go at large and if he does not pay you I will? Now if the debtor does not pay the debt he can have action on his case against me and not action of debt: so in the case of the delivery of the bread, which has been put, the plaintiff cannot have action of debt but only this action. Wherefore &c. And then the plaintiff had judgment of record. Which note.[8]

SYMMONS v. WANT.

(Court of King's Bench, Trinity Term, 1818. 2 Starkie, 371.)

This was an action of assumpsit upon a guarantee by the defendant.

It appeared that Thomas Want, the brother of the defendant, was a schoolmaster, and that he had entered into an agreement with the plaintiff, dated May 2, 1817, by which the plaintiff agreed to let to him, from the half quarter next ensuing, the use of the galleries of the Chapel, No. 6 Edward Street, Soho, for a school during the week days, at the rent of £20. per annum for the first year, and £25. per annum afterwards, by four regular quarterly payments, at the usual days of payment. It was also proved that the following document was in the handwriting of the defendant; it was directed to the plaintiff, but had no date.

"Sir: I have no objection to guarantee the payment of the rent as far as that of each quarter, during Mr. T. Want's continuance in possession, but you must see that no arrears of rent accrue."

"[Signed] J. Want."

[8] The doctrine of Jordan's Case that forbearance in any form could not create a debt has remained the law of England to the latest day. In no form has forbearance ever been held to be the quid pro quo of a debt, and the only writ successfully employed has been the action on the case on the contract of assumpsit. Rogers v. Snow, Dalison, 94 (15 Eliz.).

Some of the innumerable illustrations of forbearance promises, where the action on the case upon the assumpsit was successfully maintained, are the following:

Forbearance until Michaelmas gave rise to an assumpsit in Thornton v. Kemp, Gouldsborough, 146 (Hilary Term, 43 Eliz.). A stay of execution against a third person on request of the defendant gave rise to an assumpsit in Jennings v. Hatley, Yelverton, 19 (44 & 45 Eliz.).

An agreement by a pawnee not to sell the goods of his debtor for three days upon the defendant's promise to pay the debt. Cupper v. Dickington, 1 Rolle Rep. 215 (13 Jac. I).

Thus a discharge of a debtor from imprisonment on request gave rise to an action on the case in Atkinson v. Settree, Willes' Reports, 482 (1744).

Judge Hare, in his work on Contracts (pages 122, 133), was the first to call attention to the historical importance of Jordan's Case.

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It was proved that Thomas Want occupied the premises from May till the middle of August, when he left the place, and had not since been heard of. The defendant had not been called upon to pay the rent, and had received no notice of the default, till the following November.

Hutchinson, for the defendant, objected that the plaintiff was not entitled to recover: * * * 2dly. That the terms "I have no objection to guarantee" did not amount to a guarantee, in the absence of evidence of a request to guarantee or of an acceptance of the offer to guarantee; and he cited McIver v. Richardson, 1 M. & S. 557, where it was held that the instrument was not a guarantee, but merely an offer to guarantee, which did not become an absolute guarantee, without an acceptance of it as such. * * *[9]

HOLROYD, J., having called upon the counsel for the plaintiff to answer the second objection, and to state upon what count of the declaration they founded their claim,

Gurney and Chitty, for the plaintiff, answered that they relied on the third count in the declaration, which set forth a request by Thomas Want to the plaintiff, to sign the agreement already referred to, and then alleged that the defendant, in consideration that the plaintiff would sign the agreement, undertook to guarantee, etc., and that the plaintiff confiding etc. did sign the said agreement.

And they contended that the terms of the letter proved that it was in answer to an application to the defendant to guarantee the rent, and that it was written anterior to the agreement; but—

HOLROYD, J., was of opinion that the plaintiff had not established a sufficient case. The letter itself being without date, it did not appear whether it was written before or after the agreement was entered into; and therefore the plaintiff had not proved the consideration as stated in the declaration; and he was of opinion that the doctrine laid down by Lord Ellenborough in McIver against Richardson was applicable to the present case. Accordingly he directed a nonsuit, with leave to the plaintiff to move to set it aside, and enter a verdict for the plaintiff.[10]

FRENCH v. FRENCH.

(Court of Common Pleas, 1841. 2 Man. & G. 644.)

Assumpsit for goods sold, money lent, money paid, and interest, and upon an account stated.

Pleas: Except as to £326. 5s., non-assumpsit; to that sum, payment into court.

[9] A portion of the argument has here been omitted.

[10] An executory agreement made by the prospective creditor with the prospective guarantor to give credit to a third person will sustain a guaranty covering both past debts, and the future debt to be created by the giving of the credit. Boyd v. Moyle, 2 Com. Bench, 644 (1846).

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The plaintiff added the similiter, and accepted the £326. 5s., praying his costs and charges.[11] * * *

TINDAL, C. J. The only question in this case is whether the plaintiff has a legal right to recover the £146. 3s. 6d., and interest upon that sum. To show the defendant's liability the plaintiff produced two documents. One of them, which purports to be an account stated, contains this entry: "To principal and interest of old account with Dr. John French, transferred, as per letter, £136. 3s. 6d." From this entry it must be inferred that the sum was originally due from Dr. French, the defendant's father. But it is said that this debt was transferred, and that there might be a good consideration for such a transfer. The letter, however, instead of speaking of a transfer, states that the defendant has received from the plaintiff the sum of £321. 5s. The effect of the two documents, taken together, is to show that the defendant had allowed himself to be charged in account with a debt due from his father.

It is suggested on the part of the plaintiff that the transaction may be considered as a borrowing of money from the plaintiff, and a payment of the father's debt with the money so borrowed. The substratum of that suggestion must be that the debt due from Dr. French was satisfied. But it is inconsistent with such a supposition that the plaintiff should afterwards obtain from Dr. French's two daughters a note or engagement to pay the same debt. The ground of the suggestion therefore fails; and the case stands as one in which the defendant has undertaken, without consideration, to pay the debt of another,[12] and that, a debt which, at the time the undertaking was given, appears to have been barred by the statute of limitations. The rule must be discharged.

BOSANQUET, J., concurred.

COLTMAN, J. The substance of the agreement was a promise by the defendant to pay the debt of his father. To support such an agreement, there must be a sufficient consideration; and, by the statute of frauds, that consideration ought to appear upon the face of the instrument.

ERSKINE, J., concurred.

Rule discharged.

MAP, Executor of Holdick, v. SIR ISAAC SIDNEY.

(Court of Common Pleas, Hilary Term, 1623. Cro. Jac. 683.)

Assumpsit, for that the defendant, in consideration the plaintiff would forbear to sue one J. S. on an obligation of eighty pounds, promised to pay to him the said debt; and allegeth in fact, in the writ,

[11] The statement of facts has been abridged, being sufficiently stated in the opinion of the court, and the arguments of counsel have been omitted.

[12] Accord: Owens v. Tague, 3 Ind. App. 245, 29 N. E. 784 (1892).

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that he forbore to sue the said J. S. per magnum tempus, and that the defendant had not yet paid it to him, licet requisitus.

The declaration was that he forbore him per magnum tempus, viz. from such a time of the promise until such a day, which was for a year and a half after the promise, yet he had not paid it.

The defendant pleaded non assumpsit; and it was found against him to the damage of eighty pounds.

Hitcham moved in arrest of judgment.[13]

Lord HOBART, WINCH and HUTTON (JONES being absent in Chancery) held, that the plaintiff should recover: for they all conceived that a consideration to forbear to sue a person for such a debt is a good consideration, and it shall be intended a total and absolute forbearance (as HUTTON and WINCH held); and that if the defendant paid it before upon this promise, and after the plaintiff sued for the debt, the plaintiff is chargeable in an action upon the case, for it is an implied promise in the plaintiff that he should forbear his suit totally; but yet when the plaintiff hath forborne a convenient time (when there is no time mentioned), if the defendant do not pay the debt according to his promise, the plaintiff may well sue him upon his promise, and he needs not tarry all his life. And here, when he shows that he forbore per magnum tempus, viz. such a day and year, that well agrees with the writ; and when the date of the writ doth not appear, it shall be intended that he did forbear until the day of the writ; and so the action is well brought.

HOBART, Chief Justice, agreed with them, that the action was well brought, and the declaration good, because he shows that he did forbear it for a convenient time: and he held that he was not bound by this agreement to forbear totally; and denied, that upon this agreement he is chargeable in an assumpsit, if he (after this debt recovered from the defendant) should sue for the same debt; for it is not a promise to restrain him totally, and without express words he is not chargeable by promise. Wherefore it was adjudged for the plaintiff.[14]

[13] The argument of counsel has been omitted.

[14] **Accord:** Pafford v. Webbe, 2 Rolle, 88 (1620).

The following American authorities are in accord: King v. Upton, 4 Me. 387, 16 Am. Dec. 266 (1826); Elting v. Vanderlyn, 4 Johns. (N. Y.) 237 (1809). See Ames' Cases on Suretyship, notes, p. 226. Obiter, Lonsdale v. Brown, 4 Wash. C. C. 148, 151, Fed. Cas. No. 8,494 (1821); Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279 (1881); Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664 (1892).

In Semple v. Pink, 1 Exch. Rep. 74, 16 L. J. Ex. 237 (1847), the fact of forbearance was not shown at the trial, though the nonsuit appears to have been upheld on the theory that reasonable forbearance is insufficient. That decision is adversely criticized in Oldershaw v. King, post, p. 29.

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SECTION 2.—OFFER AND ACCEPTANCE

GAUNT v. HILL.

(Court of King's Bench, at Nisi Prius after Easter Term, 1815. 1 Starkie, 10.)

Assumpsit for non-payment of £70, in consideration of forbearance. The defendant's brother, being indebted to the plaintiff in the sum of £140., suffered judgment to go by default. After which the defendant wrote to the plaintiff the following letter.

"Sir—That it may not be said that I have made no effort to save my brother from prison, I wish to know if you will give him a full discharge if I will pay one moiety of his debt. I have specified what I will pay and no more; if you will accept this, call upon me to-morrow morning."

This letter was not dated, but the postmark upon it bore date the 28th of March. In order to show that the plaintiff had acceded to this offer, he read a letter sent by him to the defendant on the 4th of April, in which, after remonstrating with the defendant for not paying one moiety according to his offer, he says: "I have taken an opinion on your letter, and am informed that I can recover upon it against you, therefore I shall not proceed against your brother."

Lord ELLENBOROUGH was of opinion that the defendant's letter was a mere proposition to pay a moiety, reserving a power to do anything or nothing as he pleased the next day, and that at all events it would be necessary to show that the plaintiff had acceded to the proposal in writing.

Plaintiff nonsuited.[15]

WESTHEAD et al. v. SPROSON and PIPER.

(Exchequer of Pleas, Easter Term, 1861. 6 Hurl. & N. 728.)

Declaration: That on the 23d of April, 1860, the defendant made and signed and delivered to the plaintiffs a guarantee in the words and figures following, that is to say: "To Messrs. J. P. and E. Westhead & Co., etc.—Gentlemen: In consideration of your agreeing, at our re-

[15] Other letters were interpreted as "mere overtures to guarantee" in McIver v. Richardson, 1 M. & S. 557 (1813); and see the divided court in Cartlitch v. Eyles, Comyn's Rep. 557 (10 Geo. II, Hilary Term); Mozley v. Tinkler, 1 C., M. & R. 692 (1835). See Bank of Montreal v. Munster Bank, 11 Ir. Rep. (Common Law) 47 (1877).

The distinction between a general and a special guaranty is fully discussed in Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204 (1883). The general guaranty is addressed to no particular person; the special guaranty, to a particular person.

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quest, from time to time, to supply, on credit, to W. Piper such goods as he may require and you may think fit to supply, we, William Sproson and Joseph Piper, do hereby guarantee to you the due and regular payment of such sum and sums of money as he now owes, and may at any time and from time to time owe to you, on any account whatsoever, so that we shall not be answerable for more than four hundred pounds in respect of his dealings with you; and we give you full liberty to extend the period of credit to the said William Piper, and to hold over or renew any bills, notes, or other securities you may at any time hold, and to grant him and the persons liable upon such bills, etc., any indulgence, &c. This guarantee to continue good, notwithstanding any change in the parties constituting your firm. Dated, etc. Wm. Sproson. Joseph Piper." That the persons to whom the said guarantee was addressed were and are the plaintiffs, and that the names William Sproson and Joseph Piper attached to the said guarantee were and are the names of the defendants. That although the plaintiffs thereupon accepted the said guarantee accordingly, and were always ready and willing, as the defendants well knew, to supply from time to time the said W. Piper on credit such goods as he might require, according to the terms of the said guarantee, and although at the time of the giving the said guarantee the said W. Piper owed to the plaintiffs, and there was then due and payable from him to the plaintiffs a large sum of money, to wit, £400., which said sum the said W. Piper ought to have paid to the plaintiffs before suit, and although the defendants before suit had notice of the premises, and were requested by the plaintiffs to pay them the said sum of money, to wit, £400., yet the defendants made default in paying such sum, and a part thereof, to wit, £300., is still unpaid, etc.

Demurrer and joinder therein.

Phipson, in support of the demurrer. The claim against the sureties is for payment of moneys due when the guarantee was given; but there is no consideration to support a promise to pay the past debt. It is not shown that any new credit was given. The supposed consideration is the agreement. [POLLOCK, C. B. This is not such an agreement on the part of the plaintiffs as the law can enforce. It amounts only to an agreement to treat.] The words, "such as you may think fit to supply," make the supply entirely optional on the part of the plaintiffs; therefore, if there is any agreement at all, it is only an agreement to supply just what the plaintiffs may please. In White v. Woodward, 5 C. B. 810 (E. C. L. R. vol. 57), the guarantee was similar in its terms to that in the present case, but there the plaintiff supplied goods. In the course of his judgment Cresswell, J., said: "I think that a sufficient consideration is disclosed on the face of the guarantee, and that it imports that the continued supply should be bona fide and to a reasonable extent." But that observation was not necessary to the decision, which is explained by Martin, B., in Broom v. Batchelor, 1 H. & N. 255, 263, who said that the writing in White v. Wood-

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ward was construed as meaning "that, conditionally, on a real and bona fide future credit to be given by the plaintiff, the defendant contracts to guaranty." (He referred also to Taylor v. Brewer, 1 M. & Sel. 290, and Bryant v. Flight, 5 M. & W. 114, per Parke, B.) * * *[16]

POLLOCK, C. B. We are all of opinion that, upon the true construction of this document, the plaintiffs entered into no binding agreement to supply goods to W. Piper. We must therefore construe the guarantee as being conditional, so that, in the event of the plaintiffs thinking fit to supply and supplying goods to W. Piper, there would be a performance of the condition, and the defendants would be bound, but not otherwise. This makes the agreement sensible and intelligible. The substance of Mr. Mellish's argument was that, inasmuch as the parties meant to agree to supply, we must put such a construction on the document as to make it a mutual agreement. But I have no doubt that what the plaintiffs meant in saying, "we agree to supply," was to give a sort of color to the promise to pay the existing debt, but without being under any obligation to supply any more goods.

MARTIN, B. I also think that this document did not bind the plaintiffs to supply any goods. If the words are transposed thus: "In consideration of your agreeing to supply W. Piper such goods as you may think fit and he may require"—it becomes manifest that the supply is to depend entirely on the will of the plaintiffs, and that is no consideration for an agreement.

BRAMWELL, B. If it appeared that the plaintiffs agreed to do anything of value, there would be a good consideration for the guarantee. But the words "such goods as he may require" may be left out, because, of course, the plaintiffs could not supply any other. Then, striking out those words, what remedy would the defendants have on the supposed agreement for the nonsupply of goods for a month or a year? What damages could they get? The only difficulty which I have arises out of the case of Oldershaw v. King, 2 H. & N. 399, s. c. in Error, Id. 517. If it is possible to find out what is a reasonable time, I do not see why we should not be able to discover what is a reasonable supply of goods.

WILDE, B. I think that the true meaning of this instrument is, that if the plaintiffs supplied goods to W. Piper the guarantee should attach, but not otherwise.

Judgment for the defendants.†

[16] The argument for the plaintiffs is omitted.

† Contrast with Lynn Safe Deposit & Trust Co. v. Andrews, 180 Mass. 527, 62 N. E. 1061 (1902).

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SAVAGE v. FIRST NAT. BANK.

(Supreme Court of Alabama, 1895. 112 Ala. 508, 20 South. 398.)

Appeal from the Circuit Court of Calhoun. Tried before Hon. George E. Brewer.

This was an action brought by the appellee, the First National Bank of Rome, Ga., on a promissory note made by J. R. Graham & Son, and the appellant, James H. Savage, and payable to Mrs. E. J. McGhee. The note was duly transferred to the plaintiff bank. The defendant Savage pleaded specially that the note sued on was without consideration as to him, and that the bank was not the beneficial owner of the note, on which special pleas, and the plea of the general issue, the case was tried.

The plaintiffs introduced evidence tending to show that the note was executed in settlement of a suit by McGhee Bros. against J. R. Graham & Son, and that it had been transferred to the plaintiff. The plaintiff introduced in evidence a letter from J. H. Savage to McGhee, in which he admitted having signed the note, but insisted on not being sued thereon; the letter having been written for the express purpose of inducing McGhee not to bring suit against Savage. * * *

As is stated in the opinion, the evidence tended to show that the defendant Savage signed the note sued on, after it had been executed, and without any consideration moving to him.

There was a verdict returned against the defendants in favor of the plaintiff; and thereupon the defendant Savage moved the court for a new trial, on the ground that the verdict was contrary to the law and the evidence. * * * This motion was overruled, and the defendant Savage duly excepted. There was judgment for the plaintiff. The defendant Savage appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

HEAD, J.[17] * * * There was no conflict in the evidence going to show that Savage signed the note or bond sued on, after it had been fully executed and had become a complete contract between the other parties, and that it was signed by him as surety without any new or additional consideration. The letter he afterwards wrote concerning it was as much a nudum pactum as the note or bond. He was, therefore, entitled to the general charge in his favor, if he had requested it. The verdict was contrary to the law and the evidence, and on that ground the motion for a new trial ought to have been granted. If the instrument was sealed, there can be no recovery under the present complaint.

Reversed and remanded.

[17] Only so much of the case and opinion is printed as relates to the question of suretyship.

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JARVIS v. WILKINS.

(Exchequer of Pleas, 1841. 7 Mees. & W. 409.)

Assumpsit on a guarantee, with counts for goods sold and delivered, and on an account stated. At the trial before the undersheriff of Middlesex, the following document was proved by the plaintiff:

"September 11, 1839.

"I undertake to pay to Mr. Robert Jarvis the sum of £6. 4s., for a suit of, ordered by Daniel Page. S. W. Wilkins."

It appeared that the goods in question were a suit of clothes, which had been furnished to Page subsequently to the giving of the above undertaking. The plaintiff obtained a verdict for £6. 4s., leave being reserved to the defendant to move to enter a nonsuit, in case the court should be of opinion that the instrument was not a guarantee, but a promissory note, which required a stamp. A rule was accordingly obtained in Michaelmas term last. * * *[18]

Lord ABINGER, C. B. I am of opinion that there is nothing in this objection. The cases which have been cited were all of them cases where the consideration was executed, and therefore the written promise to pay the debt amounted to a promissory note; but in this case it appears, from the instrument itself, that the promise was made in contemplation of a sale of goods to be afterwards made; and it is a written undertaking that, if the plaintiff will supply the goods "ordered," the defendant will pay for them. It is a memorandum of guarantee for the sale of goods, not a promissory note, and requires no stamp.

PARKE, B. I am of the same opinion. If the memorandum contained only a promise to pay £6. 4s. for goods already supplied, it would be a promissory note, and would require a stamp; but the introduction of the word "ordered" makes all the difference, as it shows that it is a promise to pay for goods if supplied, but which were not then delivered. We are therefore enabled to collect from the instrument itself that the consideration for the promise was not an executed consideration, but the future delivery of goods already ordered. No objection has been made that the contract varies from that declared upon; and the only questions are, first, is this a promissory note? I think it is not, for the reasons I have already stated: and secondly, if not a promissory note, is it a binding guarantee? The rule is now perfectly settled, that the consideration must appear upon the face of the instrument itself, either in express terms, or by necessary implication. I think in this case the consideration may be collected by necessary inference, and therefore that the instrument is a binding guarantee.

The other Barons concurred.

Rule discharged.

[18] **The arguments of counsel are omitted.**

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R. L. POLK PRINTING CO. v. SMEDLEY.

(Supreme Court of Michigan, 1908. 155 Mich. 249, 118 N. W. 984.)

Error to Wayne; Mandell, J.

Assumpsit by the R. L. Polk Printing Company against John H. Smedley, on the guarantee of the payment of a printing contract.

There was judgment for the plaintiff on a verdict directed by the court, and defendant brings error. Reversed, and no new trial ordered.

The plaintiff conducted a printing business in the city of Detroit. The Sail & Sweep Publishing Company published a magazine known as "Sail & Sweep." The printing was done by the plaintiff. The plaintiff had an unpaid account against the Sail & Sweep Publishing Company on June 15, 1904, amounting, as is claimed, to $2,888.55. The Sail & Sweep Publishing Company desired plaintiff to print its July magazine. Some negotiations at this time were entered into between Mr. Lloyd, the manager of the plaintiff, and the defendant Smedley, looking to some security for the account. Lloyd died before this suit was tried. Consequently under the statute Mr. Smedley cannot testify to what took place between them.

The result of the negotiations was that on June 15, 1904, defendant Smedley sent to plaintiff the following letter: "Mr. Charles W. Lloyd, Detroit, Mich.—Dear Sir: Mr. Van Fleet this morning spoke to me concerning the Sail & Sweep Publishing Co.'s account with your firm. At present the directors of the company have a plan under way for taking care of your account, but we will be delayed for a short time because of the absence of Mr. Franklin H. Walker, of this city. In the meanwhile, in order that you may not feel alarmed, I, personally, will guarantee the account, although I presume you know that your account is fully covered by stock liabilities of the stockholders of the company. Very truly yours, John H. Smedley."

After this letter was written, plaintiff printed the July magazine, the cost of which was $186.24. It continued to publish other numbers into 1905. On January 14, 1905, the indebtedness of the Sail & Sweep Publishing Company to plaintiff being $3,318.87, the Sail & Sweep Publishing Company gave plaintiff a 90-day note, guaranteed by defendant Smedley and one Murray, which note is now in suit pending in this court. The court, upon the ground that the contract was ambiguous, permitted parol evidence to show the intention of the parties; the plaintiff contending that it was a continuing contract covering the past and future accounts, the defendant contending that it covered only the cost of publishing the July number of the magazine. The court directed a verdict for this amount, with interest.

GRANT, C. J. (after stating the facts). It is urged on the part of the plaintiff that this was a continuing guaranty, covering both past and future indebtedness, that such is the plain intent appearing

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upon the face of the guaranty, and that therefore parol evidence of conversations at and prior to the time of its execution and of the surrounding circumstances is inadmissible as tending to change the plain terms of the contract. This contention cannot be maintained. The contract is ambiguous. It is impossible to tell to what account it referred. If the guaranty included solely a pre-existing account, it was without consideration and void. 1 Brandt on Suretyship & Guaranty (3d Ed.) § 97, and authorities cited; Walrath v. Thompson, 4 Hill (N. Y.) 200. If it referred to a future account, or if it included the past and also a future account, there would be a valuable consideration for the promise of guaranty. Parol evidence was therefore admissible to explain the ambiguity, and determine what account was intended to be covered by the guaranty. Columbus Sewer Pipe, etc., Co. v. Ganser, 58 Mich. 385, 25 N. W. 377, 55 Am. Rep. 697; Walrath v. Thompson, supra; White's Bank of Buffalo v. Myles, 73 N. Y. 335, 29 Am. Rep. 157; 1 Brandt on Sur. & Guar. (3d Ed.) § 97. The mouths of the two persons, Mr. Lloyd and Mr. Smedley, who made the contract, being closed by the death of one, we must look to find other evidence of what the parties intended. Persons are presumed to know the law, and we cannot, therefore, assume that the parties to this contract intended to include only an account wholly pre-existing, and thus make a void contract.

One Fred Van Fleet was at the time of the transaction connected with the Sail & Sweep Publishing Company. He saw Mr. Lloyd, the manager of the company, about the publication of the July number. He testified that Mr. Lloyd asked to be secured, not for the old account, but for the expense of publishing the July number before he published it; that witness went to see Mr. Smedley; that while in Mr. Smedley's office Mr. Smedley had a telephonic conversation with Mr. Lloyd; and that, after this conversation, Mr. Smedley agreed to take care of the bill for publishing the July number. This is the only testimony of any probative force to show the intent of the parties, except that the plaintiff in January following took a guaranty for $2,800 from Smedley and Murray. There is nothing in the record to impeach or cast discredit upon the testimony of Mr. Van Fleet.

We think, therefore, that the trial judge was correct in holding that the guaranty covered only the expense of the July issue, and that he was correct in directing a verdict for that amount, unless the record showed that the amount had been paid. Was it paid? The answer to that question depends upon how payments subsequently made should be applied. Plaintiff made no election. It kept a running account with the Sail & Sweep Publishing Company, charging it in the continuous account for work done, and crediting it on the same account with payments. Such was the status when this suit was commenced. We held in Grasser & Brand Brewing Co. v. Rogers, 112 Mich. 112, 70 N. W. 445, 67 Am. St. Rep. 389, that, where payments are made and credited generally upon an account, they will in an action against a surety be

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applied upon the indebtedness in the order of the creation of the several items. See, also, Gard v. Stevens, 12 Mich. 292, 86 Am. Dec. 52.

Applying this rule—and we see no occasion to depart from it—the plaintiff's account, guaranteed by the defendant, was paid, and he was entitled to have a verdict in his favor. For this reason, the judgment will be reversed, and no new trial ordered.

BLAIR, OSTRANDER, and BROOKE, JJ., concur. MONTGOMERY, J., concurred in the result.

BOURKE v. BUXTON and DE VILLIERS.

(Supreme Court of the South African Republic [Transvaal], 1889. 3 Supreme Court Cases, S. A. Republic [Transvaal], 39.)

Buxton, a contractor built a house for De Villiers. He was taken by De Villiers to Bourke, a merchant, and introduced as an honorable and trustworthy man. On the strength of this introduction Bourke supplied Buxton with building material. De Villiers came with Buxton to Bourke's yard, discussed prices of material, and also supported Buxton with a bill, which was paid. Bourke stated that he looked to De Villiers for payment. The arrangement between Buxton and De Villiers was that on the former obtaining the architect's certificate De Villiers would pay him. Buxton relied on this money to pay Bourke for the material, having no other funds at his disposal. On production of the architect's certificate De Villiers did not pay Buxton, who consequently left Bourke unpaid. Bourke now sued Buxton and De Villiers as Buxton's guarantor.

KOTZE, C. J. The court grants absolution from the instance.

S. JORISSEN and DE KORTE, JJ., concurred.

DOWNING v. ROBINSON et al.

(Court of Appeals of Maryland, 1908. 109 Md. 35, 71 Atl. 129.)

Appeal from the Circuit Court for Harford County; Duncan, J.

The cause was argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, WORTHINGTON, and HENRY, JJ.

SCHMUCKER, J., delivered the opinion of the court.

The bill in this case asserts and seeks to enforce the right of the appellant to the benefit of an alleged claim of the appellee Charles A. Macatee against his coappellees for a portion of the purchase money for certain building lots. The material circumstances which are asserted to have conferred on the appellant the right of subrogation or substitution to the claim of Macatee appear from the record to have been as follows: In the year 1890 a Virginia corporation known as the "Front Royal & Riverton Improvement Company," of which Henry

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A. Downing was president and Charles A. Macatee was a director, attempted to develop as an addition to the town of Front Royal a tract of farming land lying in its vicinity. For that purpose, the means then currently employed in exploiting town sites in the valley of Virginia were adopted. Engagements were secured from various educational, manufacturing, and industrial enterprises to establish themselves on the property. The land was platted and laid out in streets and blocks, and a prospectus was prepared and issued setting forth in glowing terms the present advantages and future prospects of the situation, and then building lots were offered for sale. The appellees other than Charles A. Macatee were residents of Maryland, and had no interest in the improvement company, but, their attention having been called to its enterprise, they visited Front Royal, and inspected the property to see whether it presented any opportunities for profitable investment. The fever of speculation then prevalent in that neighborhood proved sufficiently contagious to induce them to agree on October 20, 1890, to purchase from the company 11 of its building lots, embracing in all about one acre of land, at prices aggregating $8,100, to be paid one-third cash and the balance one half in one year and the other in two years after date. A short time thereafter it was agreed between the purchasers of the lots and Charles A. Macatee that he should assume one-seventh interest in the purchase, and that, as a matter of convenience, the title to the property should be taken and held in his name. The first installment of purchase money was paid by the 7 appellees in equal shares, and the 11 lots were conveyed by the company to Macatee, who gave to it his 22 individual bonds for the 2 deferred installments. He then as evidence of the nature of his holding of the title as between him and his coappellees executed and delivered to them the following declaration of trust:

"This declaration of trust made this ——— day of November, in the year eighteen hundred and ninety, by C. A. Macatee, of Front Royal, Virginia. Whereas the said C. A. Macatee has received from the Front Royal & Riverton Improvement Company of Front Royal, Va., deeds for the following lots in or near Front Royal, Va., viz.: Lots No. 23 & 24 in block 23, Sixth St. Lot 14 in block 18 Sixth St., lots 1 and 2 in block 17 Va. avenue, lots 1 and 2 block 15 Va. avenue, lots 9 & 10 block 21 Commerce avenue, and lots 1 and 2 block 33 Warren avenue as located on a plot of the property owned by said Front Royal & Riverton Improvement Company, and whereas the said C. A. Macatee has only a one-seventh interest in said lots, the other six-sevenths interest therein being owned equally by J. H. C. Watts, Martin L. Jarrett, Edwin H. Webster of Jno., William S. Forwood, Jr., Thomas H. Robinson and Frank B. Macatee, all of Harford county in the state of Maryland, and whereas said parties have paid to the said Front Royal & Riverton Improvement Company one-third of the purchase money, each party paying one-seventh thereof (being $350.58) at the execution of said deeds to C. A.

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Macatee; and whereas said lots were purchased as aforesaid for the purpose of conveying them to such purchaser or purchasers at such time and for such price as the parties interested therein may direct and to save inconvenience and delay in the execution of a conveyance it was agreed that the legal title to said lots should be put in the name of the said C. A. Macatee:

"Now, therefore, the said C. A. Macatee does hereby declare that he has only a one-seventh interest in the aforesaid lots purchased from the Front Royal & Riverton Improvement Company and particularly described in the deed from said company to the said Macatee, the other six-sevenths interest therein being owned equally by the said J. H. C. Watts, Martin L. Jarrett, Edwin H. Webster of Jno., William S. Forwood, Jr., Thomas H. Robinson, and Frank B. Macatee, of Harford county, Maryland. Witness my hand and seal the day and year above mentioned. C. A. Macatee. [Seal.]"

The second installment of purchase money for the lots was paid at or near its maturity by Charles A. Macatee to whom the other appellees each sent a check for his share of the installment, although the improvement company and its development scheme had already sunk into a languishing condition. When the third installment fell due, Charles A. Macatee paid his own one-seventh of it, but the other appellees, with the exception of J. H. C. Watts, never paid their shares of it. By that time the speculative boom in the valley had collapsed, and the improvement company and its projects had come to naught. Charles A. Macatee was financially ruined by the failure of the company, and he still remains in an insolvent condition. On the 28th of February, 1898, Henry H. Downing was appointed receiver of the improvement company by the circuit court of Warren county, Va., and directed to collect the assets of the corporation and to institute and maintain such suits as might be necessary for that purpose. On October 21, 1904, but 3 days less than 12 years after the maturity of the last installment of the purchase money for the lots purchased from the company by the appellees, Downing, as receiver, having first obtained leave of the court for that purpose, filed the present bill against them for the recovery of that installment, with interest.

The theory of the bill is that, as the result of the relation existing between the appellees in reference to the purchase of the lots referred to, Charles A. Macatee stands in the attitude of surety for his coappellees, and in that situation is entitled to claim reimbursement from them to the extent of their respective portions of the unpaid balance of purchase money and interest, and that the appellant as the creditor of Macatee is entitled to the benefit of his claim against them. All of the appellees as defendants below answered the bill. Charles A. Macatee filed a separate answer, practically admitting all of the allegations of the bill, and consenting to the granting of the relief prayed for. The other appellees as defendants filed a joint answer, admitting the purchase of the lots and their conveyance to Charles A. Maca-

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tee and the execution by him of the declaration of trust in their favor, and the payment by them of two installments of the purchase money and the non-payment of the third one by any of them except J. H. C. Watts, but denying the existence of any indebtedness or obligation on their part to Macatee or to the appellant or the corporation of which he claimed to be the receiver. Their answer further set up by way of defense that they had been induced to purchase the lots by the fraudulent representations of Downing and Macatee as president and director of the improvement company. They also set up and relied upon the statute of limitations in their answer as a defense to the bill. The case was heard in due course in the court below, and the bill was dismissed by the decree from which this appeal was taken.

The appellant contends that in the state of facts to which we have adverted Charles A. Macatee should be in equity regarded as standing in the situation of surety for his coappellees for the payment of the purchase money for the 11 lots, and he invokes in behalf of the improvement company, under whose title he claims, the well-recognized equitable proposition that, when a principal debtor has given any security or other pledge to his surety, the creditor is entitled to the benefit of such security or pledge in the hands of the surety to be applied in payment of the debt. He also relies upon the other equitable doctrine, which has repeatedly been recognized by this court, that a surety, after the debt has become due, may maintain a bill to require the principal debtor to pay it, whether the surety has been sued for it or not. Both of these two equitable doctrines are supported on the appellant's brief by the citation of numerous decisions of this and other courts, and, if either of them were applicable to the facts disclosed by the record, it may be conceded that it would be conclusive of his right to recover.

It is, however, fundamental to both of the propositions so relied on by the appellant, that Charles A. Macatee be determined to have been surety for his coappellees for the payment of the purchase money for the 11 lots; but we are unable to find in the record sufficient ground for holding him to have occupied that relation to them. He was not formally their surety, for the bonds which he gave to the company for the deferred payments were not their obligations on which he appeared as surety. They were his individual obligations for a debt for which both he and his coappellees had been originally liable. The arrangement in reference to the purchase and proposed sale of the lots into which the appellees entered, as evidenced by the declaration of trust executed by Macatee, created a tenancy in common, or, at most, copartnership as between them, but it did not involve a suretyship. A somewhat similar arrangement as to the purchase and sale of lands for account of several persons was held by us in Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367, to have constituted its participants copartners. The present case fails to fall within the operation of the first mentioned of the two equitable doc-

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trines under discussion, for the further reason that the record does not show that the appellees, other than Macatee, ever placed in his hands any security or pledge which can be applied to the payment of the debt now sought to be recovered.

Nor is the appellant entitled to the benefit of the other proposition relied on in his brief, and supported by the authorities therein cited, that, when a surety or even an agent has paid a debt of the principal debtor, he is entitled to recover from the latter the amount so paid for him, because Macatee, to whose right the appellant seeks to be subrogated, is not shown to have paid any debt for which his coappellees were liable, otherwise than with funds furnished to him by them for that purpose.

The original liability of the appellees to pay for the lots purchased was so far as the record shows a simple contract obligation. If that obligation was not extinguished under the rulings of this court in Davidson v. Kelly, 1 Md. 492, by the giving and receipt of Macatee's individual bond for the debt, it has long been barred by the statute of limitations which was set up by the answer of the appellees as a defense to the present suit.

During the progress of the case below the appellees as defendants took a number of exceptions to the admission of testimony, but they were not passed upon by the circuit court for the reason doubtless that the appellant as plaintiff had not made out a case for relief in equity. Having come to the same conclusion as to the insufficiency of his case, we deem it unnecessary to notice those exceptions. We think it due to the appellant and to the appellee Charles A. Macatee to say that in our judgment the record does not sustain the charges made against them, in the answer of the other appellees, of fraudulent conduct in procuring or making the sale of the lots on behalf of the improvement company.

For the reasons stated in this opinion, the decree appealed from will be affirmed.

Decree affirmed, with costs.

OLDERSHAW et al. v. KING.

(Court of Exchequer Chamber, 1857. 2 Hurl. & N. 517.)

Error on the judgment of the Court of Exchequer on a special case. The case and judgment of the court below are reported in 2 Hurl. & N. 399.

COCKBURN, C. J., now said:[19] I am of opinion that the judgment of the court below must be reversed. The question arises on a con-

[19] Arguments of counsel are omitted.

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tract of guarantee. (His Lordship read the defendant's letter.†) It was contended in the court below, and before us, that, looking at the language of this document, it must be taken that the contract was based entirely on the consideration that Oldershaw would forbear to press for the immediate payment of the debt due to him at the time this letter was written; and it was said that the consideration was insufficient, an agreement to forbear to press for immediate payment being too vague to constitute the consideration for a promise; and several authorities were cited in support of that position, and particularly the case of Semple v. Pink, 1 Exch. 74. We think, however, that this is not the true construction of the contract. I agree with what was said by the Lord Chief Baron in the court below, that we must not construe this document with the strictness with which we should construe a pleading, but must look to the whole of the instrument in order to see what was the real meaning of the parties. Thus, though the words of promise on the part of the defendant follow immediately after the words "in consideration of your forbearing to press them for the immediate payment of the debt now due," we need not construe the words as we should the statement of a contract in a declaration. It stands thus, the defendant says: John and Joseph Francis King being indebted to you for professional business, and cash lent and advances, and you having the right to close the account and insist on immediate payment, if, instead of doing so, you will leave the account open, and make further advances, although I do not ask you to bind yourself to do so, still, if you do so, I will be responsible to you to the extent of £1,000. The consideration is not simply the forbearing to press for immediate payment, but also the future advances, which, though not stipulated for, were contemplated by the parties.

But supposing the sole consideration was the forbearing to press for immediate payment, I should not be prepared to assent to the doctrine laid down in Semple v. Pink. There are authorities for saying that an agreement to forbear for a short time, or a little time, is too indefinite to constitute a consideration for a contract; but I am

† "21 Manchester Terrace, August 24, 1848.

"Dear Sir: I am aware that my uncles J. and J. F. King stand considerably indebted to you for professional business and for cash lent and advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become still further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you and my said uncles to a certain extent and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum that they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of £1,000, whenever called upon by you to pay the same, and after twelve calendar months previous notice.

"To Robert Oldershaw, Esq. I remain, &c.

"William Thomas King."

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not at all prepared to assent to the proposition that an agreement to forbear for a reasonable time would not be sufficient. I see no reason why the question as to what is a reasonable time should not be considered and determined with reference to the circumstances of the case by a jury. As, however, in the view I take of this case, the contract discloses a sufficient consideration independently of such forbearance, it is not necessary to go the length of overruling Semple v. Pink.

ERLE, J. I concur in the opinion expressed by the Lord Chief Baron in the court below, and the Lord Chief Justice in this court, and therefore I think that the judgment of the majority of the court below ought to be reversed. The first question is upon the construction of the document, whether it is a contract in consideration of time being given by the creditor, to the debtor, or a contract in consideration of time being so given, and further advances to be made? Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was, that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract. I am also of opinion, that, although the amount of further advances and of the time to be given is not defined, still, if time is given and advances are made, it is enough. These undefined terms ought to receive a construction in reference to facts given in evidence "ut res magis valeat quam pereat." If the guarantor has had the advantage he bargained for, we must hold him to his promise.

That suffices for the judgment of reversal in the present case. I concur with the Lord Chief Justice with respect to the case of Semple v. Pink, 1 Exch. 74. I do not assent to the doctrine that a guarantee in consideration of an agreement to give time is void unless the time to be given is defined in the contract. But it is not necessary to decide that point.

WILLIAMS, J. I am of the same opinion. I think that the case involves no question of law at all. It merely turns on the construction of the guarantee. In my opinion, the true meaning of the instrument is that the defendant contracted with Oldershaw that if, without pressing for immediate payment, he would continue his transactions uninterruptedly with the defendant's uncle, that the defendant would guaranty the payment of the balance of their account at any time within six years, to the extent of £1,000. If that was the true construction of the agreement, then the holding it valid is in accordance with all the authorities cited in the argument.

CROMPTON, J. I do not disagree with the result of the judgments which have been delivered, but I am bound to say that I differ from

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the rest of the court as to the construction of this contract. I think the view taken of the meaning of the parties by my Brother BRAMWELL in his judgment is the correct one. I agree that we must see what is the promise and what is the consideration upon which it is founded, and that to ascertain this we may look at all the facts of the case. And I quite agree with the doctrine established in the case of Johnston v. Nicholls, 1 C. B. 251 (E. C. L. R. vol. 50), that where there is a consideration, that is sufficient to support a promise to guarantee either past or future debts. My Brother MAULE puts the case on the true ground, viz., that the substance of such a contract as the present is that, in consideration that the plaintiffs will do something in future, the defendants promise, in like manner, to do something in future. Here, supposing that the consideration is good, it is clear it would support a promise to pay the balance, whether arising from new or old debts. Then what is the consideration?

The answer to that question does not depend on any technical rule, but on a consideration of the whole document as a mercantile instrument, treating that which the parties have expressed in words as that which they really intended to express. I think the meaning is: If you forbear to press for the immediate payment of the old debt, I will agree to guarantee the balance, whether it remain the same or whether it is added to. There are not two promises. It is one promise to pay the balance, whether arising from fresh dealings or from the former dealings. It is said to be part of the understanding that there should be fresh dealings; but I think that is not so, and that the parties meant the promise to apply, whether there were fresh dealings or not. To construe the document otherwise seems to me to be putting a meaning upon it different from that which the parties intended. Oldershaw is not to engage himself to make further advances, and it is clear to my mind that the defendant engaged to pay, if Oldershaw gave time; and, on the other hand, if Oldershaw did not give time, that no action could have been maintained on this guarantee, notwithstanding that he made fresh advances. Therefore it seems to me that the parties did not intend it to be, and we should be altering the contract if we make it, a part of the consideration for the promise that there should be any fresh dealings. The consideration was that Oldershaw should not press for immediate payment, and I think that the giving a reasonable time is a sufficient consideration.

In the old authorities, mentioned in Comyn, it is said to be sufficient if there is an agreement for forbearance for a definite portion of time, or for a reasonable time; and in Payne v. Wilson, 7 B. & C. 423, Lord Tenterden rests his judgment on the ground that it must be taken that the plaintiff had suspended proceedings for "a definite or reasonable time." I do not see any great difficulty in saying that what is a reasonable time may be determined at nisi prius. It may be difficult to say what a reasonable time is; but the difficulty is not greater than in many other cases where there is a promise to do a thing in a rea-

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sonable time. And the only distinct authority against that is the case of Semple v. Pink. The court, however, in that case had really to decide whether there was a variance between the guarantee proved and that set out in the declaration. If I had to decide the case now, I should be inclined to say that a reasonable time might be implied, because no time was mentioned in the contract. That was the point before the court.

WILLES, J. I am of the same opinion. Assuming that we are only to look to the words of the document, and to see what is there stated as the consideration for the contract without regard to the previous recital, the consideration would appear to be "forbearing to press for the immediate payment of the debt due." There are many authorities which show that in cases like the present the word "immediate" may be construed to mean within a reasonable time to do the act in question.[20] Accordingly, I think that forbearing to press for immediate payment means forbearance for a reasonable time.

Then it is said that that is not a sufficient consideration, because of the indefiniteness of the word "reasonable," and because it might be competent to the person who entered into a contract, engaging to forbear for a reasonable time, to sue the next instant, or within a very short time. Looking for a moment to the mode in which the question of reasonable or unreasonable time would be determined, the difficulty vanishes. The question whether the creditor had forborne for a reasonable time or not would be determined by the jury. Now, suppose the consideration expressed had been forbearing for such a time as a jury who might try the question should consider reasonable, there can be no doubt but that it would be a perfectly good contract, and for a good consideration. That is what is tacitly expressed in this instrument. There are many cases in which, the reasonableness of the time in which to do a thing not being fixed by legal decisions, as in the case of the dishonor of a bill of exchange, it is left to the jury as a question of fact with reference to the circumstances of the particular case. I do not see on what principle an agreement to forbear for a time stipulated for by the parties should not constitute a good consideration. There are authorities to that effect: Com. Dig., "Action on the Case on Assumpsit," (B) (B1). In Payne v. Wilson, 7 B. & C. 423 (E. C. L. R. vol. 14), Lord Tenterden seems to treat it as clear that

[20] That a request to forbear suit, followed by forbearance for a reasonable time, will constitute a consideration, is settled in Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279 (1881); Hakes v. Hotchkiss, 23 Vt. 231 (1851).

A promise "in consideration of your withdrawing the petition you have presented for winding up the company called John King & Co." has been held sufficient. "If a man expressly contracts that, a particular petition being withdrawn, he will pay a sum of money, that is a good contract; it was his own folly not to provide against another petition being filed. It is obvious that a real benefit is gained by the withdrawal because of the disinclination to commence a new proceeding after so much labor and expense have been wasted." Bramwell, B., in Harris v. Venables, L. R. 7 Exch. 235 (1872).

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the forbearance for a reasonable time would be sufficient consideration. No doubt there are authorities on the other side; but if we are to choose between authorities, one class of which tends to defeat, and the other class to uphold the intention of the parties, I should have no difficulty in adhering to the latter class.

The construction put upon this instrument by my Brother CROMPTON was that which first suggested itself to my mind; but I think that it is not likely that the parties, in the relation in which they stood to each other at the time the guarantee was given, looked to forbearance alone as the consideration. There is a recital which shows that it was expected that the dealings would continue between Oldershaw and J. and J. F. King. I find, by the subsequent part of the instrument, that it was supposed that they might continue during six years; and then there is the suggestion that "in all probability they will become still more indebted," evidently expressing a desire that the advances should be continued, not binding the creditor to make advances, but to induce him to make them. Probably, therefore, the most just construction of the instrument is that which has been put upon it by my Lord Chief Justice and my Brothers ERLE and WILLIAMS. But in either view of the case the plaintiffs are entitled to recover, and the judgment of the court below ought to be reversed, and judgment given for the plaintiffs, both as to past and future advances.

Judgment reversed.[21]

WYNNE v. HUGHES.

(Court of Exchequer, 1873. 21 Wkly. Rep. 628.)

Case stated without pleadings.

It appeared that the late O. D. Hughes had been solicitor of the plaintiff, and as such had been intrusted by him with moneys, which were still in his hands at the time of his death.

The defendant, with two other persons, was by will appointed executor of, and remained in charge of, the offices of O. D. Hughes. The plaintiff required from the defendant a settlement of the accounts between himself and the testator. The amount was £500.

On the 15th February, 1872, the plaintiff's agent wrote the following letter to defendant: "I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow."

To this the defendant replied on the 16th February: "I undertake to pay £500. on the account between my late brother, Mr. O. D. Hughes and your client on or before this day three weeks." On the 15th April the defendant paid to the plaintiff £50. on account of the £500.

[21] No notice of the sale of goods appears to have been given in Evans v. Beattie, 5 Esp. 26 (1803), yet recovery was had.

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The plaintiff contended that the guarantee contained in the letter of 16th April was given by defendant in his personal and individual character; contra, the defendant that the guarantee was only binding on him in his representative character as executor.[22]

KELLY, C. B. The plaintiff is entitled to judgment. There are two letters to consider in this case. The first from plaintiff's agent to defendant: "I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow."

The second in reply from the defendant: "I undertake to pay £500. on the account between my late brother, Mr. O. D. Hughes, and your client on or before this day three weeks."

It is true that the plaintiff did not expressly agree to forbear suing for three weeks, but he did in fact forbear, and that to me, independently of all authority, appears to be a good consideration for the defendant's promise to pay, and consequently I hold that the defendant entered into a good and binding promise.

BRAMWELL, B. I am of the same opinion. The obvious meaning of these letters is, "If, instead of suing, you will wait, I will pay you in three weeks." Three weeks is not mentioned by the plaintiff, yet it is clear that a delay of three weeks was bargained for and accorded. This is an action against an executor, charging him with liability on behalf of a testator. The first clause of the fourth section of the statute of frauds requires for purposes of suing that a promise to such effect should be in writing. The mercantile law amendment act dispenses with the necessity of the consideration for a promise to answer for the "debt, default, or miscarriage of another" being in writing, yet it may be that the mercantile law amendment act is limited to the second clause of the third section of the statute of frauds, for the very words of the third section of the mercantile law amendment act appear in that second clause. But, however that may be, the natural construction of the letters above referred to is, "If you will give me time I will pay." Certainly the creditor is not thereby bound to wait. The contract is what may be called unilateral, one under which the promisor is contingently liable. The creditor, however, does wait, and then the promise to pay, upon the expiration of the delay, becomes binding upon the defendant.

The argument that the plaintiff ought on his side to have expressly agreed to wait three weeks, otherwise that there is a mere bare promise, is met by this consideration, that the plaintiff did show his consent to such delay in suing by his delay to sue. The only difficulty presented to my mind by Oldershaw v. King is that the creditor never undertook to pay at any specific time, and therefore that the consideration was void for uncertainty. It was said that the forbearance should be for a reasonable time, and when we inquire how a "rea-

[22] The arguments of counsel are omitted.

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sonable time" is to be determined, we find Willes, J., proposing that the question should be decided by a jury. That is unsatisfactory, and the case on that point appears to me not well decided. But in the Court of Exchequer Chamber the judges held that the creditor had done nothing, and therefore on this point it is a decided authority against the defendant's contention.

POLLOCK, B. I am of the same opinion. If this case had been argued only on authority, Semple v. Pink, 1 Exch. 74, apart from Oldershaw v. King, would have been a strong authority in favor of Mr. Morgan Lloyd's contention. Semple v. Pink was cited in Oldershaw v. King, and although the court did not expressly overrule it, I believe the effect of the later case has been to override the former.

Judgment for the plaintiff.

CREARS v. HUNTER.

(Court of Appeal, 1887. L. R. 19, Q. B. Div. 341.)

Appeal from the order of the Queen's Bench Division (Day and Wills, JJ.) setting aside the verdict and judgment for the plaintiff at the trial.

The facts in substance appeared to be as follows:

The action was on a promissory note, the defense being that there was no consideration for the making of the note by the defendant.

The defendant's father, since deceased, had, before the defendant came of age, borrowed a sum of £200. from the plaintiff, promising that his son, the defendant, when of age, would become surety for the debt. In 1877, the defendant being then of age, the plaintiff brought a promissory note stamp to the defendant's father's house, where the defendant then was, and the promissory note now sued upon was then drawn up and signed by the defendant's father and the defendant. By such note they jointly and severally promised to pay to the plaintiff or order "the sum of £200., being money lent, with interest on the same from Martinmas last past half-yearly at the rate of 5 per cent. per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest had been paid upon the note. It appeared that on several occasions such interest was paid in the defendant's presence, and the receipts for such payments of interest were made out to the defendant's father and the defendant jointly. The principal being still due, the plaintiff brought his action on the note against the defendant Hunter and his father's executor.

The learned judge at the trial, A. L. Smith, J., appeared, in substance, to have told the jury that, if the note was signed by the defendant in order that the plaintiff might give time to his father, and the plaintiff did give time, there would be a good consideration for

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the making of the note by the defendant, and he left it to the jury to say whether there was such consideration.

The jury found for the plaintiff.

The Divisional Court set aside the verdict on the ground that there was no evidence of consideration, and entered judgment for the defendant.[23]

Lord ESHER, M. R. In this case the defendant's father had borrowed money of the plaintiff, and was actually liable to pay the amount so borrowed. The plaintiff purchased a promissory note stamp, and went with it to the house of the defendant's father, and there found the defendant's father and the defendant, who was at that time under no obligation whatever to the plaintiff. A promissory note was drawn up, which does not, it is true, on the face of it provide for any delay in payment of the amount due by the father, because the father's liability on the note arose immediately after it was signed, if the plaintiff had chosen to sue on it. The note does nevertheless indicate on the face of it that, though there was no binding agreement to forbear, the parties did contemplate that the note might not be sued on for some time, because provision is made for the payment of interest half-yearly by the son jointly with the father. It may be true that there was no evidence of any request in express terms by the son that the plaintiff would forbear to sue the father, but what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note? I take it to be undoubted law that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. It is quite clear on the other hand that a binding promise to forbear would be a good consideration for a guarantee.

The question is whether, if the guarantor requests the creditor to forbear from suing and the creditor on such request, although he does not at the time bind himself to forbear, does in fact afterwards forbear to sue, there is a good consideration for the guarantee. It seems to me that it was laid down in Oldershaw v. King, 2 H. & N. 399, 517, that there would in such a case be a good consideration, and I do not think that any of the cases cited to us is really to the contrary. Erle, J., there said: "Looking at the whole letter and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion that the consideration contemplated was that further advances should be made and time given by the creditor before he would press for payment of the existing debt. Though the contract did not bind the creditor to make further advances or to give time, unless he chose to do so, it is clear that, if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and

[23] The arguments of counsel are omitted.

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binding contract." It clearly follows from what he there says that, if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt.

It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to entitle the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible. I am of the opinion that there was evidence to go to the jury that what the parties really understood in their minds was that, if the plaintiff would give the defendant's father time to turn round, the defendant would guarantee the payment of the principal in the end and in the meantime interest at the rate of 5 per cent. per annum half-yearly. I not only think that there was evidence of such an understanding, but I entirely agree with the inference drawn by the jury. I cannot see any other reasonable explanation of the transaction than that the understanding was as I have said.

For these reasons I think that the verdict and judgment at the trial were right, and that the decision of the Divisional Court must be reversed.

LINDLEY, L. J. I am of the same opinion. In this case the plaintiff obtained a verdict in an action on a promissory note, the question left to the jury being whether there was any consideration for the defendant's giving the note. The Divisional Court have set aside the verdict and entered judgment for the defendant on the ground that there was no evidence of any consideration. We therefore have to consider whether there was any evidence of a good consideration for the signature of the note by the defendant. Looking at the document and the history of the transaction, I cannot invent any rational theory by which to account for the defendant's giving the note except that it was for the purpose of benefiting his father by procuring for him time to pay the debt. To say otherwise appears to me inconsistent with human nature and the whole character of the transaction. It may be that there is no evidence that the defendant actually said that he would be liable, if the plaintiff would give his father time. But, except on the theory that such was the understanding between the parties, the defendant's conduct is inexplicable. I cannot think that there was no evidence for the jury that there was forbearance by the plaintiff at the request of the defendant. On the contrary, the evidence to the effect that there was seems to me overwhelming.

Then the question arises whether that would constitute a sufficient consideration. Upon looking into the authorities it seems to me to be the result of other cases besides Oldershaw v. King, 2 H. & N.

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517, and Mills v. New Zealand Alford Estate Company, 32 Ch. D. 266, that it is not essential that the plaintiff should have agreed to forbear: it is quite sufficient if he did forbear at the request of the defendant. It is argued that in thus deciding we contravene the decision in the case of Crofts v. Beale, 11 C. B. 172. But I do not so read that case. There the question was left to the jury whether there was consideration or not, the judge having told them that, if the note was given to prevent legal proceedings against the principal debtor, there was sufficient consideration for it. The jury found for the defendant, i. e. that there had been no request and no consideration. In this case the jury found that there was consideration.

LOPES, L. J. In this case the question is whether there was evidence of a consideration for the making of this note by the defendant. The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration. Taking the latter of these two alternatives, it is undisputed that there was actual forbearance from suing in this case. That by itself would not be sufficient; such forbearance must have been at the request, express or implied, of the defendant. There is no evidence here of any express request. It seems, however, clear that there is evidence of an implied request, and I think the jury were justified in finding that there was such a request. Unless it were to procure forbearance, it is inconceivable why the defendant should have signed the note at all. The case is strengthened when it is borne in mind that the note provides for the payment of interest half-yearly by the father and son jointly, thus clearly indicating to my mind that forbearance was contemplated at the request of the son.

For these reasons I think the judgment of the court below should be reversed.

Appeal allowed.[24]

EDDOWES et al. v. NIELL.

(Supreme Court of Pennsylvania, 1793. 4 Dall. 133, 1 L. Ed. 772.)

This was an action on the case, for goods sold and delivered to William Niell, upon a special assumpsit by the defendant, Thomas Niell, to guarantee the payment of the price. Pleas: (1) Non-assumpsit, on which issue was joined; and (2) the statute of limitations, to which resident beyond seas was replied, etc.

[24] The English cases must be read in reference to the fourth section of the statute of frauds, and the decision of Wain v. Warlters, 5 East, 10 (1804), and its subsequent nullification by the "Mercantile Law Amendment Act," 19 & 20 Vict. c. 97, § 3.

In those American jurisdictions which tolerate parol evidence of the consideration, the question arises presented by the principal case. A number of these cases are collected in Ames' Cas. on Suretyship, note, pp. 225, 226.

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The plaintiffs were British merchants, from whom William Niell, a trader in Baltimore, was accustomed to import goods. On the 14th of January, 1771, his brother, the defendant, wrote a letter to them, in which he said, "that to strengthen his brother's credit, he would guarantee all his dealings with their house." Several shipments of goods were made both before, and after, the receipt of this letter; and William Niell continued to make payments on account, till the year 1775, when the Revolutionary War began its agitations, and all commercial and amicable intercourse, between Great Britain and the United States, was suspended until the peace of 1783. In the year 1784, the plaintiffs sent a power of attorney to collect the debts due to them here. Their agent applied to William Niell, who acknowledged the justice of the debt, but claimed an abatement of eight years' interest, on account of the war, and a further credit upon giving his bond for the amount which the agent refused. In 1785, William Niell died, leaving the defendant, his executor, to whom, in that character, the agent of the plaintiffs applied for payment; and he answered, by admitting the claim, and recommending a suit against the estate. No demand, however, was made, on the ground of the defendant's guarantee, till about the time of commencing the present action, in January 1790.[25]

By THE COURT. Letters of credit are a common, and useful, instrument in the course of commerce. They are, however, of a very serious nature; and the writer is bound to comply with the contents, according to their genuine and honest import. In order to render them obligatory as a contract, it is not necessary that they should be answered, if credit is given upon them. Like the case of transmitting a bond in a letter, acquiescence and acceptance are implied, in the silent receipt of the instrument.

It has been urged that the lapse of nineteen years, without notice of a default in payment by the principal, is a virtual abandonment of all recourse to the surety, on the principles applicable to bills of exchange, and to other negotiable instruments. But there is no analogy between the cases; for the engagement of the letter of credit extends, in its very nature, to various future transactions, without reference to time or amount. It is true, however, that the gross negligence of a creditor, even of the obligee in a bond, may operate to discharge a surety, as where the obligee is requested by the surety to proceed against the principal, in order to save the debt, if he neglects or refuses to do so, the surety, both in law and equity, will be exonerated; and this is the case in 2 Brown's Chancery Reports, 579.[26] But does the evidence in the present action justify an adoption of the rule? From the years 1771 and 1772, when the shipments were made, until the year 1775, when payments were first suspended, there could be no reason for calling on the defendant. From 1775, till the peace of 1783, the debtor was

[25] The arguments of counsel are omitted.

[26] This is an incorrect statement. See post, chapter IX, section 1.

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guilty of no default, which would warrant an application to the surety; for he was prevented, by the war, from corresponding with the creditor, and making any payment, or remittance, on account of the debt. As soon as the peace had restored the intercourse between the parties, the creditor applied for payment to the debtor, who acknowledged the debt, claimed an abatement of interest, and made some overtures for a settlement, but died in the next year, without effecting anything in that respect. The agent of the plaintiffs then addressed the defendant, not as surety, but as executor, of his brother; and, indeed, it does not appear that the agent knew of the letter of credit till some time afterwards.

On this review of the facts, we cannot perceive any culpable negligence, on the part of the plaintiffs, in pursuing their original debtor; nor is it clear that they had any right to call upon the defendant, as a surety, until they had failed in their endeavors to recover from the principal, or the principal had become notoriously insolvent. The want of notice, therefore, in such a case, and under such circumstances, does not, in itself, furnish a bar to the demand; and although, in some instances of debts, a lapse of time will warrant a presumption of payment, yet, from the nature of this contract, no such presumption can arise here.

Verdict for the plaintiffs.[27]

[27] Accord: Reigart v. White, 52 Pa. 438 (1866); Cowan et al. v. Roberts, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845 (1904).

See Mathews v. Chrisman, 20 Miss. 595, 51 Am. Dec. 124 (1849).

Contra: Evans v. McCormick, 167 Pa. 247, 31 Atl. 563 (1895); Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205, 80 Am. St. Rep. 832 (1900); Lachman v. Block, 47 La. Ann. 505, 17 South. 153, 28 L. R. A. 255 (1895); Milroy v. Quinn, 69 Ind. 406, 35 Am. Rep. 227 (1879) which concedes that when "the thing guaranteed is definite in its amount, and known to the guarantor at the time he gives his guaranty, neither notice of the acceptance of the guaranty, nor of the default of his principal needs to be given to the guarantor"; Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583 (1841).

In some jurisdictions the question of the right to notice has been met by rather violently holding a mere offer to guarantee the payment of any goods which may be sold as "a direct, absolute, and original promise." See Wright v. Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639 (1890), and Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686 (1890), wherein notice was, by the above method of dealing with the problem, held unnecessary.

The notion that the minds of the contracting parties must meet has likewise been invoked to justify some of the decisions contra to the principal case. See German Savings Bank v. Drake & Co., 112 Iowa, 184, 83 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 335 (1900), Nading v. McGregor, supra.

A distinction (whether or not based upon any substantial difference is a matter for discussion) is taken between an offer to guarantee a pre-existing debt and a debt to be presently created. Notice of acceptance, it has been said, is unnecessary in the former, but not in the latter case. Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279 (1881).

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LENT et al. v. PADELFORD.

(Supreme Judicial Court of Massachusetts, 1813. 10 Mass. 230, 6 Am. Dec. 119.)

The plaintiffs declared, in case, that a certain writ of execution in their favor, and against one Joseph Barney, was in the hands of T. Hinsdale, a deputy sheriff, which the said Barney was unable to satisfy, and that the defendant, by his written note, undertook and promised the plaintiffs, in consideration that they would delay the service of said execution until the first Monday of June then next, and, in consideration of value received by the defendant of said Barney, that the said Barney should make his appearance and be ready at Pittsfield, at the tavern of J. M., either to pay said execution (meaning any execution that might issue upon the same judgment), or to surrender himself to any officer who might have such execution on said day, and that, if Barney was not ready, etc., as aforesaid, the defendant would pay to the plaintiffs the amount due upon such execution, with the interest thereon from the day of making the promise; and the defendant reserved to himself the right to go after the said Barney, if he should go out of the state, and deliver him at the place above mentioned on the fourth Monday of June aforesaid, thereby intending to exonerate himself from his said obligation. And the plaintiffs aver that, confiding in the defendant's said promise and undertaking, the service of said execution was delayed, etc., and no service has ever been made upon it; that said Barney did not make his appearance, etc., although the said Hinsdale was then and there ready to receive payment, or to take the body of the said Barney; that the defendant did not deliver him at, etc., on the said fourth Monday of June, although the said Hinsdale was then there ready to take his body, etc.; and that the defendant has never in any manner discharged said execution, or paid the said interest. Whereby an action has accrued to the plaintiffs to recover of him the amount due upon said execution, with the said interest. Yet though often requested, etc.

In a second count, the plaintiffs set forth the judgment on which the execution issued, the return of the first execution, which was in force and in the hands of the deputy sheriff at the time of the promise alleged, and the issuing of an alias execution, with like averments, as in the first count.

The defendant pleaded, 1st, the general issue, which was joined; and, 2dly, in bar, that the said Barney did, before the said first Monday in June, viz., on the 2d day of March, 1809, go into the state of New York to reside; that previously to the said fourth Monday in June, viz., on the 17th day of the same month, the same Barney did seasonably set off to return to this commonwealth, to surrender himself at the said tavern on the said fourth Monday of June, to any officer having the said execution; and on his way, on the 19th day of June, within the state of New York, was attacked with bodily sickness,

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and was there of necessity confined and detained by said sickness, so long a time that he could not possibly surrender himself, or be delivered by the defendant, at the said tavern, to any officer having the said execution; and that, as soon afterwards as he possibly could, on the day succeeding the said fourth Monday, he arrived at the said tavern, and offered to surrender himself to the said Hinsdale, then holding the said execution.

The plaintiffs, in their replication, traverse the said sickness, and tender an issue to the country, which is joined by the defendant.

At the trial of the issues thus joined, which was had before Parker, J., at the last May term in this county, the plaintiffs offered in evidence, in support of their declaration, a writing signed by the defendant, of which the following is a copy:

"Whereas, there is now an execution in the hands of Theodore Hinsdale, Jr., deputy sheriff, in favor of James W. Lent and William H. Folger, against Joseph Barney, for the sum of $795.74, and it cannot now be paid by said Barney: Therefore, if said execution can be delayed till the first Monday of June next, and in consideration of value received of said Barney, I hereby agree and promise that said Barney shall make his appearance, and be ready at Pittsfield, in the county of Berkshire, at the house of Joseph Merrick, either to pay said execution, or to surrender himself to any officer who may have the same at that time, or I will pay the same, with the interest from this time, to said Lent and Folger. Savoy, Feb. 28, 1809. And, further, I reserve to myself the right to go after said Barney, if he goes out of the state, and deliver him at the place above mentioned on the fourth Monday of June aforesaid. Manley Padelford."

The counsel for the defendant admitted the execution of the said writing, but objected to the admission of it in evidence to the jury, because it did not contain any evidence of a promise to the plaintiffs, nor of any consideration for the promise, and because it substantially varied from the declaration, which objection was overruled by the judge, and said writing was admitted in evidence.

No other evidence of the promise or consideration was offered by the plaintiffs; but it was proved and admitted that Barney did not appear at Pittsfield, and offer himself to said Hinsdale on the first or fourth Monday of June, 1809, nor until the day following the latter, when he arrived there and offered to surrender himself to said Hinsdale, who then had said execution in full force. And it was admitted that the execution was in the hands of Hinsdale on the day when the said writing was signed. It was also proved by parol testimony, which was objected to, that, at the request of the debtor, the agent for the plaintiffs authorized the officer to forbear arresting him, upon obtaining the contract declared upon. It was likewise admitted that an alias execution was in the hands of the same officer on the day after the fourth Monday in June, and that, by direction of the same agent of the

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plaintiffs, the officer refused to arrest the debtor, when he offered to surrender himself.

The jury were instructed that the contract declared upon and produced was sufficient in law to support the action, and that, if the evidence offered by the defendant on the second issue failed of proving it, they ought to return their verdict for the plaintiffs on both issues, and that the damages ought to be equal to the debt and costs upon the execution, with interest thereon from the commencement of the action.

A verdict being accordingly found for the plaintiffs, a new trial was moved for by the defendant, because the judge admitted the writing aforesaid, whereas it is variant from the declaration, in that it does not appear that the promise was made to the plaintiffs, nor upon such consideration as is alleged in the declaration; because the judge instructed the jury that the said writing contained evidence of a promise to the plaintiffs, and of a sufficient consideration to support the plaintiffs' declaration, no other evidence thereof being offered; because the judge instructed the jury, if they found a verdict for the plaintiff, to give the entire sum mentioned in said promise in damages, although it was proved that the said Barney came to said tavern in Pittsfield, and offered to surrender himself to said Hinsdale, who then had said execution in full force, on the day next after the said fourth Monday in June; and because the judge admitted parol evidence to prove that delay of the said execution was given on receiving said promise.

The defendant also moved in arrest of judgment, because there is no sufficient consideration for the defendant's promise alleged in the plaintiffs' declaration, it not appearing that any promise or agreement was made on the part of the plaintiffs, as the ground of the promise on the part of the defendant, and because the supposed promise of the defendant is a collateral undertaking, and there is no averment, in the declaration of notice to the defendant, that said Barney did not appear at the time mentioned, nor of any request to pay the money demanded before the suit was brought.[28]

JACKSON, J. * * * The first point to be considered, in the motion for a new trial, is the supposed variance between the declaration and the writing produced in evidence. It is never necessary to declare in the precise words of a written promise. It is always allowable, and often necessary, to declare according to their legal effect and import. In the present case, we have no doubt that the promises contained in the writing were made to the plaintiffs. They are the only persons interested in the subject of the promises, which do not purport to be made to any other person; and the defendant expressly promises, in the event which has happened, to pay the money to the plaintiffs. It is like the case of a common promissory note. The words of the note are, "For

[28] The arguments of counsel, as also a portion of the opinion dealing with the statute of frauds and the memorandum, also on the question of agency, are omitted.

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value received I promise to pay to A. B.;" but in the declaration upon such a note it is always alleged that the defendant promised A. B. to pay him.

As to the other supposed variance, we are equally satisfied that the declaration comports with the legal effect of the writing. The expression, "if the execution can be delayed," as introduced in this paper, is equivalent to saying "if you will delay it," or "in consideration that you will delay it."

The next ground of the motion for a new trial is the supposed misdirection of the judge in instructing the jury that the contract was sufficient in law to support the action. We are all satisfied that this direction was right. We have already said that the contract was made with the plaintiffs; and, indeed, it further appears, from the report, that it was made by the express authority of their agent. * * *

As to the amount of damages, we are satisfied that the jury were rightly instructed by the judge. This is not merely an agreement by the defendant to do a collateral thing; nor is the money to be paid by way of penalty for a breach of the contract. We do not consider the damages, thus liquidated by the parties, to be unreasonable in the event which was contemplated, and which has since occurred. The defendant has agreed, in a certain event, to pay this sum; and we have no power, in this case, to alter his agreement.

There are two grounds of the motion in arrest of judgment. The first is that no sufficient consideration for the defendant's promise is set forth in the declaration. The declaration states that, in consideration that the plaintiffs would delay the service of their execution, the defendant promised; and then it is averred that the plaintiffs did delay the service accordingly. This appears to us sufficient. It is the usual mode of declaring in such case in the books of entries.

This manner of stating the consideration and the contract is not confined to cases of forbearance. It is not uncommon, in the case of goods sold, to declare that, in consideration that the plaintiff would sell and deliver to the defendant such goods, the latter promised to pay a certain price, and then to aver that he did sell and deliver them accordingly. So, in consideration that the plaintiff would do any other specific thing, and then aver the performance, without alleging that the plaintiff had promised to do it. This is not one of the cases in which it is necessary to state in the declaration mutual promises, as the consideration of each other.

The other ground of the motion in arrest of judgment at first excited the most doubt in the minds of the court. It is the want of averring notice to the defendant that the said Barney did not appear at the time and place prescribed, and a special request to the defendant to pay the money.

But, upon further consideration, we are all satisfied that the declaration is in this respect sufficient. The general rule is perfectly well

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settled. When the matter alleged lies peculiarly in the knowledge of the plaintiff, he must aver that the defendant had notice; but, when it lies equally in the knowledge of the defendant, such averment is unnecessary. The case at bar comes within the latter branch of the rule. There was no act to be done exclusively by the plaintiffs. It may even be said that the matter, by which the defendant was to be discharged, was an act to be performed by himself. He promises that Barney shall make his appearance; he undertakes to have him at a day and place certain, and he must know whether he has done so.

But, without going to this length, it is sufficient if the act were to be done by a stranger. The defendant had as good means of information as the plaintiffs, and he was bound to take notice whether Barney made his appearance at the time and place appointed. It was not necessary, then, for the plaintiffs to give him formal notice of the fact; and, of course, it is not necessary to aver such notice in the declaration.

As to the want of averring a special request, we should yield with difficulty to such an objection, after a verdict on the merits of the case. The only use of a special request is to avoid vexatious suits, by giving to the defendant an opportunity of paying an undisputed demand. It is apparent, in the case before us, that it would have been a fruitless ceremony. We are not, however, satisfied that such a request was required by the strictest rules of law. The defendant may be considered as agreeing to do, or cause to be done, one of two things. When he knew that the one was not performed, he became immediately liable to perform the other. The payment of the money became a present duty, as if there had been no alternative in the original contract. In such a case, the general averment of licet sæpius requisitus is sufficient.

Judgment on the verdict.[29]

[29] An exhaustive annotation to the case of Lent v. Padelford was written by Hare and Wallace in 2 Am. Leading Cases (5th Ed.) pp. 59–141, tracing the English decisions, and showing that the common law of simple contract furnishes no warrant for the position that the offeree of an offer to become surety or guarantor must notify the offeror that action has been taken on his offer. Detriment incurred on request is sufficient consideration to support assumpsit.

In accord with the principal case are the following American decisions: Cowan et al. v. Roberts, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845 (1904), drawing an imaginary distinction between a suretyship and a guaranty in relation to the law of offer and acceptance. Mathews v. Chrisman, 20 Miss. 595, 51 Am. Dec. 124 (1849). (Semble) Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545 (1855), holding a guarantee to be continuing but no evidence of notice; Snyder v. Click, 112 Ind. 293, 13 N. E. 581 (1887); Whitney v. Groot, 24 Wend. (N. Y.) 82 (1840).

In Smith v. Dann, 6 Hill (N. Y.) 543 (1844), the court said, by Mr. Justice Bronson: "The defendant invited the plaintiffs to sell goods to Steel & Wall, on his promise to guaranty the payment of the debt. The plaintiffs assented and delivered the goods. The proposition of one party was accepted by the other, and according to our notions of the law this made a complete contract. * * * If the defendant wanted notice, and did not get it, from the persons whom he thought worthy of credit, it was his business to inquire and ascertain what had been done. * * * We cannot add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiffs. I know there are cases which require notice;

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LENNOX et al. v. MURPHY et al.

(Supreme Judicial Court of Massachusetts, 1898. 171 Mass. 370, 50 N. E. 644.)

Contract, against Patrick Murphy and Michael Murphy, upon a guaranty, dated August 17, 1895, and signed by the defendants. Writ dated August 29, 1896. Patrick Murphy alone defended. Trial in the superior court, without a jury, before Sheldon, J., who found for the defendant, and, with the consent of the parties, reported the case for the determination of this court. The facts appear in the opinion.

HOLMES, J. This is an action on a guaranty "to the extent of ten thousand dollars, on obligations contracted and to be contracted by Murphy Brothers with P. Lennox & Co., for a period of three years, with the understanding that P. Lennox & Co. give Murphy Brothers a permanent credit of at least twenty thousand dollars in leather for the above period of three years." The action is defended only by Patrick Murphy. At the trial in the court below, after the evidence was in, the judge found for the defendant, and the case is here on a report, by the terms of which, if the ruling was wrong, judgment is to be entered for the plaintiffs. The grounds mainly urged in support of the ruling are want of consideration and a failure to notify the defendant of the acceptance of the guaranty.

There was evidence that, before Patrick Murphy signed the guaranty, one of the firm whose obligations were to be guaranteed exhibited to him an instrument to be signed by the plaintiffs, and told him the contents of it, and told him also that if he would sign the guaranty it would keep the speaker on his feet and keep him going. The only reasonable inference from this and other evidence is that, in spite of the usual formula, "for one dollar and other considerations," the guaranty in fact was executed in consideration of the plaintiffs' signing the other instrument referred to, and that Patrick Murphy understood, when he signed, that if he signed the plaintiffs would sign. The plaintiffs signed as expected.

The instrument executed by the plaintiffs was as follows: "For one dollar and other considerations, we, P. Lennox & Co. guarantee Murphy Brothers a permanent credit for three years to the amount of twenty thousand dollars in leather, and agree that Murphy Brothers shall not owe P. Lennox & Co. less than twenty thousand dollars at any time

but we think they are not based upon the common law, and for that reason they have not been followed in this state."

A distinction—whether or not based upon any substantial difference is a matter for discussion—is taken between an offer to guaranty a pre-existing debt and a debt to be presently created. Notice of acceptance is said to be unnecessary to the former, but not in the latter, case. Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279 (1881).

The general question is ably treated and many cases are collected by W. P. Rogers, Dean of the Law Department of the University of Cincinnati, in a paper entitled "Notice of Acceptance in Contracts of Guaranty," 5 Columbia Law Review, 215 (1905).

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during this period, except at their own option, and Murphy Brothers agree to buy leather from P. Lennox & Co., to the extent of at least twenty-five thousand dollars per annum, and P. Lennox & Co. agree to sell Murphy Brothers as cheap as any reliable shoe manufacturer. This agreement to be null and void in case Murphy Brothers become insolvent during this period. P. Lennox & Co."

When this paper was signed, the consideration was furnished and the offer in the defendants' instrument became a contract, unless some one of the objections which we shall mention bars the way. The gravest of these is that the plaintiffs' undertaking does not satisfy the stipulation in the defendants' guaranty. The guaranty calls for a permanent credit of at least $20,000 for three years. The plaintiffs' agreement contains a statement that Murphy Bros. agree to buy leather to the extent of at least $25,000 per annum, and it might be held that the failure of Murphy Bros. to buy to that extent would excuse the plaintiffs from their undertaking, or in other words that Murphy Bros.' performance of their agreement is introduced as a condition into an undertaking to do what is called for unconditionally by the guaranty. It may be that this objection would be fatal if the guaranty had called in the same terms for a counter agreement not yet framed. But, as we have said, in fact the words were an abbreviated reference to a paper already in existence, although not yet signed. It is plain that the words of the guaranty need construction. It is not to be supposed that the giving of credit for three years is contemplated as the consideration, for that would leave the guarantors unbound until the three years had elapsed. The consideration must be a promise to give credit. But the operation of the promise as consideration has to be proved by evidence outside the writing. The words on their face do not go further than to state a condition, if they do that. Curtis v. Hubbard, 6 Metc. 186, 191, 192. The question is whether in that aspect they do not state an absolute condition—whether they are open to explanation from the circumstances. We are of opinion that the circumstances may be considered in aid of the interpretation. The words "with the understanding," when read in connection with the facts, refer to an understanding already reached and put in writing, a counter agreement by the plaintiffs with the partners guaranteed. This counter agreement is absolute and free from other condition than the performance of the consideration, and for purposes of reference it is not necessary to set out this necessarily implied term any more than it is in the case of a memorandum of a promise under our statute of frauds. Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683.

The proviso that the plaintiffs' agreement shall be void in case Murphy Bros. become insolvent during the period of its running only expresses what would be implied in any event. For although it has been said that an agreement to sell—even if it would seem to a partnership, which is dissolved by insolvency—is not discharged by insolvency

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yet it is agreed that insolvency would put an end to the right to purchase on credit or without a tender of the price. Morgan v. Bain, L. R. 10 C. P. 15, 21, 27. See Cremer v. Higginson, 1 Mason, 323, 337, Fed. Cas. No. 3383. The obligation to sell on credit was all that concerned the defendant. Moreover, if what we have said as to the reference to this document is correct, it is taken up with all its terms into the defendant's undertaking.

But it is objected further that acceptance of the guaranty, or, more strictly, the furnishing of the consideration by the plaintiffs, was not communicated to the defendant. We are of opinion, as we have said, that it would have been open to the presiding justice to find that the guaranty was signed on the understanding that, if it was signed, the plaintiffs would sign. If so, when the understanding was carried out, it was not necessary to notify the defendant. He already had all the notice he needed, and to send him notice would have been merely a formal act, which is not required either by custom or by the theory of contract. There is no universal doctrine of the common law, as understood in this commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract, although such a necessity might be inferred from some of the language in Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686 and Davis Sewing Machine Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480. See Paige v. Parker, 8 Gray, 211; Hatch v. Hobbs, 12 Gray, 447; First National Bank v. Watkins, 154 Mass. 385, 387, 388, 28 N. E. 275; Bishop v. Eaton, 161 Mass. 496, 499, 37 N. E. 665, 42 Am. St. Rep. 437; Bascom v. Smith, 164 Mass. 61, 41 N. E. 130; Brogden v. Metropolitan Railway, 2 App. Cas. 666, 691; Harriman, Contracts, 86–89; Langdell, Contracts § 2 et seq.[30]

If a contract was made, the only remaining objections urged against the plaintiffs' recovery are that they did not perform their contract, and that they could not sue until after the three years had elapsed. The former proposition is put upon the ground that, although Murphy Bros. owed the plaintiffs more than $20,000, only the sum of $16,000 was in the form of a debt for merchandise, and the rest, $8,000, was in the form of notes. The notes were given by Murphy Bros. for leather, and we do not perceive what difference the change in the form of the indebtedness made with regard to the plaintiffs' contract, although as a matter of bookkeeping the notes may have been charged on a separate page. Norton v Eastman, 4 Greenl. (Me.) 521, 525. There is nothing in the guaranty which requires the plaintiffs to wait three years before bringing suit Marsh v. Day, 18 Pick. 321.

Judgment for the plaintiffs.[31]

[30] See, also, Chapin v. Lapham, 20 Pick. 467 (1838).

[31] Where the offer is accepted when made, and a bilateral contract then arises between the surety and the creditor, obviously no notice would be

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PAYNE & WOOD v. IVES, SARGON & MANN.

(Court of King's Bench, 1823. 3 Dow. & Ry. 664.)

Assumpsit upon a guaranty. Plea, non-assumpsit, and issue thereon. At the trial before Abbott, C. J., at the adjourned Middlesex sittings, after last Trinity term, the case was this: The plaintiffs (who were coach-lace manufacturers), in March, 1821, having furnished Mr. Stubbs (who was in the habit of shipping goods to India, under the firm of John Stubbs & Co.) with lace to the amount of £837. applied to the defendants, one of whom, Mrs. Ives, was aunt to Stubbs, to guarantee the payment of that sum. To this the defendant Mann, on the part of his firm, consented, and the following guaranty was given to the plaintiffs, being in the handwriting of Mann, and signed by him only, on behalf of the firm: "We undertake to indorse any bill or bills Mr. John Stubbs may give to Messrs. Payne & Co., in part payment of an order for lace, which is now being executed for him; Messrs. Payne & Co. to allow £5. per cent. on the amount of the said bills for the said guaranty. Ives, Sargon & Mann. April 19, 1821."

The goods were delivered to Stubbs, who immediately shipped them for India, and at the same time paid the plaintiffs £500. in money and wine, and in the month of June following accepted a bill drawn on him by the plaintiffs, for £337. at eighteen months date, which is the period of credit usually allowed in the India trade. The plaintiffs retained the bill, without making any application to the defendants to indorse it, for the space of seventeen months and ten days, when Stubbs having become insolvent, and the plaintiffs being acquainted with that fact, tendered the defendants £17. the amount of the commission mentioned in the guaranty, and required them to indorse the bill. The defendants, however, declined either to accept the commission, or to indorse the bill, and after some interval the present action was brought. Upon this evidence two objections were taken for

required. Lynn Safe Deposit, etc., Co. v. Andrews, 180 Mass. 527, 62 N. E. 1061 (1902); White v. Woodward, 5 M. G. & S. 808 (1848).

This point is well expressed in Cooke v. Orne, 37 Ill., at page 189 (1865): "The proposition comes from Orne. He says by the letter of Henkle, if Cooke will guaranty the payment, I will sell. Cooke writes in the postscript of Hulme & White's letter that he will guaranty. The moment he wrote that acceptance of Orne's offer, the bargain was complete. He then knew that the goods were to be furnished upon his credit. He knew his guaranty was already accepted, and that he would be responsible for the goods, if furnished before the guaranty was withdrawn, and within a reasonable time. Any further notice of the acceptance of the guaranty would have been superfluous."

"The mutuality of obligation is not a sound criterion. In a contract of guaranty for further advances to a third person, the plaintiff is not always bound to make the advances; but the duty to see him harmless arises upon the advances being made." Patteson, J., in Mills v. Blackall, 11 Q. B. 358 (1847).

In Dover Stamping Co. v. Noyes, 151 Mass. 342, 24 N. E. 53 (1890), no further notice was given than: "We are much obliged for the assurance given us regarding Messrs. F. P. Field & Co., and on the strength of it will be glad to continue the trade." There was judgment for plaintiff.

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the defendants: First, that the guaranty having been signed by one partner only, without any proof of the privity of the others, could not bind the latter, and would not support a joint action against all the partners, and for this Duncan v. Lowndes, 3 Campb. 478, was cited; and, second, that the plaintiffs, by having kept the bill for more than seventeen months, without ever tendering the commission, or demanding the indorsement till after they knew that Stubbs was insolvent, had waived the benefit of the guaranty. The Chief Justice overruled the objections, and left it to the jury to say, first, whether the guaranty had been given with the privity and consent of all the defendants; and, second, whether in their opinion the plaintiffs had in fact discharged the defendants from their responsibility, by omitting to call upon them to indorse the bill for so long a period. The jury found for the plaintiffs.[32]

ABBOTT, C. J. I think there ought to be a new trial in this case, but it must be upon payment of costs by the defendants. The £5. per cent. is to be allowed "for the said guaranty," and therefore the plain meaning of the contract is that the indorsement of the bill should be the consideration for the commission, and that, until the bill was indorsed, no commission should be due. This I take to be the legal construction of the instrument, and then the question arises, whether the application for the indorsement was made in due time. Now the general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. But for the plaintiffs to forbear their demand for seventeen months out of eighteen was neither reasonable nor convenient, for it was inflicting an injury upon the defendants by keeping them during all that time out of their commission. Besides, here the plaintiffs lie by until they learn that Stubbs has become insolvent, and until they discover that the indorsement is the only means by which they can secure their debt; and but for that discovery, they probably never would have applied at all. That I think they were not entitled to do under the agreement, and consequently that they ought not to have recovered in this action. The whole case certainly depended much upon a question of fact, and was therefore for the decision of the jury; but I also think that the construction of the agreement is a question of law, and as the defendants chose to introduce two grounds of defense, one good and the other bad, the latter of which is now abandoned, I think the jury were somewhat misled, and that the plaintiffs are entitled to have the case reconsidered on the only true ground, namely, the construction of the guaranty.

BAYLEY, J. I entertain no doubt upon the legal construction of this guaranty. It gives the plaintiffs an option to have the indorsement or not, but it provides that they are not to pay the commission unless they do have the indorsement. It is signed by the defendants only, and therefore it is binding upon them only, for if it had been intended to have been binding on both parties, both would have signed it. Then

[32] The arguments of counsel are omitted.

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the option given to the plaintiffs ought to have been made in reasonable time, and at any rate before that event occurred, of which, if the defendants had known, they would never have signed the guaranty. I am therefore of opinion that the conduct of the plaintiffs has been contrary to the spirit of the agreement, and that the case ought to be submitted to the consideration of another jury.

HOLROYD, J. It is quite clear that this instrument was not originally binding upon both parties, because, although it begins with the words "We undertake," it is signed by the defendants only. It has, I think, been held that an instrument, beginning "It is agreed" and signed by one of the parties only, was not binding upon the other party, until accepted by him.[33] Now here there never was any acceptance by the plaintiffs; they had an option to make the agreement binding by paying the commission, but they did not exercise that option till within a few days of the bill becoming due, and till they knew of the insolvency of the acceptor. I think they were not justified in that delay, and that is the only question in the cause. With respect to bonds, it is laid down by Lord Chief Baron Comyns,[34] that "where a condition is to do a transitory thing without limiting any time, it ought to be done immediately, viz. in convenient time." But it cannot be said, that the tender of the commission in this case was made "in convenient time"; for, on the contrary, the plaintiffs delayed acting upon the contract, until circumstances had occurred, which were dehors the contract, and which rendered it unsafe to the defendants to fulfill it. I am therefore of opinion that the rule for a new trial ought to be made absolute.

Rule absolute, upon payment of costs.

DAVIS SEWING MACH. CO. v. RICHARDS et al.

(Supreme Court of the United States, 1885. 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480.)

This was an action, brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the counties of Prince George and Montgomery in the state of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the corporation under the contract, and should not engage

[33] Vide 1 Saund. 291, note 1; Id. 320, note 4.
[34] Com. Dig. tit. "Condition," G, 5.

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in the sale of sewing machines of any other manufacture, and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in certain manner; and either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company, of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3,000) dollars. Dated Washington, D. C., this 17th day of December, 1872.

"A. Rothwell.
"A. C. Richards."

Under the guaranty were these words:

"I consider the above sureties entirely responsible. Washington, December 19, 1872. J. T. Stevens."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties, to the plaintiff at Watertown in the state of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants, and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The court instructed the jury as follows: "It appearing that, at the time the defendants signed the guaranty on the back of the contract between the plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiff approved the responsibility of the guarantors and sent the contract to Watertown, N. Y., to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants

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of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the general term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in. [35]

Mr. Justice GRAY delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686, in which the earlier decisions of this court upon the subject are reviewed.[36]

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, [37] or if the latter's agreement to accept is contemporaneous with the guaranty, [38] or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract.† But if the guaranty is signed by the guarantor

[35] The authorities cited by counsel are omitted.

[36] In this case the contract of the guarantor was by specialty, and furthermore the specialty acknowledged the receipt of a present consideration of $1. It was held that no notice of acceptance was required.

In point of fact, at the date of execution of the guaranty there was a balance against the principal of $9,000, which was subsequently reduced to $6,200 when the account was closed. It does not appear that the debit balance was ever increased at any time by temporary advances of credit. See, in accord with Davis v. Wells, Bryant v. Stout, 16 Ind. App. 380, 44 N. E. 68, 45 N. E. 343 (1896); Powers v. Bumcratz, 12 Ohio St. 273 (1861).

"If, however, the guarantor covenants, instead of giving a parol promise, he will be irrevocably bound in spite of the want of mutuality, because sealed agreements follow the rule of the civil law that an undertaking followed by assent, constitutes a unilateral contract, although nothing is done or promised on the other side." Hare on Contracts, p. 181.

[37] But if this merely means that where the offeror (the guarantor) agrees to extend the credit if the offeree (the guarantee) will sign, the case falls under the second class given in the opinion.

If this means that a request to know whether a guaranty will be given will not make a contract when, following such request, the written offer to guaranty is acted on, the proposition is contradicted by the cases below referred to under note 39.

[38] But a mere agreement to accept the defendant as guarantor, without contemporaneously agreeing to make the advance to the principal, would not be a common-law contract.

† It is submitted that the following classification of cases is in accordance with the common law:

(1) Guarantor or surety is offeror, and writes to guarantee: "If you will forbear to sue X., I will guarantee his debt." Forbearance for a reasonable time gives rise to a unilateral contract of assumpsit, and notice of acceptance is unnecessary. Lent v. Padelford, 10 Mass. 230, 6 Am. Dec. 119 (1813), supra, p. 42.

(2) Guarantor or surety is offeror, and writes to guarantee: "If you will sell goods to X., I will guarantee his debt." Sale and delivery to X. gives rise

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without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.[39]

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented

to a unilateral contract at common law, and notice of acceptance and of sale is therefore unnecessary. Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644 (1898). Contra, Davis, etc., Co. v. Richards, supra, p. 52.

(3) Guarantor or surety is offeror, and writes to guarantee: "If you will promise to sell goods to X., I will guarantee his debt." Guarantee promises to sell. This forms a bilateral contract, and further notice of acceptance or of sale is superfluous. Lynn, etc., Co. v. Andrews, 180 Mass. 527, 62 N. E. 1061 (1902), and cases in note 31, ante, p. 50. See note, "Necessity of Notice to a Guarantor of Acceptance and Default," in 20 H. L. R. 485, 503.

(4) Guarantee is offeror, and writes to surety or guarantor: "If you will guarantee, I promise to sell goods to X." Guarantor promises (contemporaneously or by letter). This forms a bilateral contract, and further notice of acceptance or of sales is superfluous. Cooke v. Orne, 37 Ill. 189 (1865).

(5) Guarantor or surety seals and delivers to guarantee a specialty covenanting to guarantee X.'s debt if goods are sold to him. A sale and delivery to X. follows. There is here a specialty contract, and notice of sales is superfluous. Davis v. Wells, Fargo & Co., 104 U. S. 159, 26 L. Ed. 686 (1881). Powers v. Bumcratz, 12 Ohio St. 273 (1861).

[39] But this proposition is in contradiction of Lent v. Padelford. See ante, page 42, and cases in note to that case; Cartlitch v. Eyles, Comyn's Reports, 558 (1738).

In Somersall v. Barneby, Cro. Jac. 287 (1611), where the plaintiff, upon solicitation of the defendant, became surety for the defendant's son in reliance upon the promise of the defendant to save the plaintiff harmless, and thereby suffered loss, it was moved in arrest of judgment, "because it is not alleged that he gave notice unto the defendant of that bond, nor requested him to save him harmless from it; and the defendant is a stranger thereto, and doth not know in what bonds the plaintiff is obliged with his said son; and being a future thing to be entered into by the plaintiff, the defendant, being a stranger, ought to have notice thereof from him; but if it had been to save him harmless from bonds formerly entered into, it had been otherwise, for there by intendment the defendant had as well cognizance of them as the plaintiff; sed non allocatur; for the court said it was all one, and that he at his peril ought to take notice thereof. * * * Wherefore it was adjudged for the plaintiff."

In apparent accord are other subsequent English cases: Evans v. Beattie, 5 Esp. 26 (1803), where no notice appears to have been given of the sale and delivery.

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to by the plaintiff, until long afterwards, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.[40]

DUTCHMAN v. TOOTH.

(Court of Common Pleas, Trinity Term, 1839. 5 Bing. N. C. 577.)

To assumpsit on a promise by the defendant (in consideration that the plaintiff, at the defendant's request, had paid the defendant 2s. 6d.) to guarantee the plaintiff that he should be paid for goods, before the promise, consigned by him to the defendant's brother, John Tooth, at Sydney, and also for goods that might thereafter be consigned to him:

The defendant pleaded that the promise in the declaration mentioned was a special promise on the part of the defendant to answer for the debt and default of Tooth in the declaration mentioned, and that no agreement in respect of or relating to the promise or cause of action, nor any memorandum or note thereof, wherein the consideration for the said special promise was stated or shown, was in writing and signed by the defendant, or by any other person by him thereunto lawfully authorised, according to the form of the statute in such case made and

[40] Accord: Evans v. McCormick, 167 Pa. 247, 31 Atl. 563 (1895); Acme Mfg. Co. v. Reed, 197 Pa. 359, 47 Atl. 205, 80 Am. St. Rep. 832 (1900); Sears v. Swift & Co., 66 Ill. App. 496 (1896); German Savings Bank v. Drake & Co., 112 Iowa, 184, 83 N. W. 960, 51 L. R. A. 758, 84 Am. St. Rep. 335 (1900).

Contra: Tilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 S. W. 386 (1906). See Doud v. National Park Bank, 54 Fed. 846, 4 C. C. A. 607, 2 U. S. App. 655 (1893), where the principal case was not followed on the ground, inter alia, that in the principal case the guarantor merely signed for accommodation. See, also, cases cited in notes to Lent v. Padelford, ante, p. 42, and Eddowes v. Neal, ante, p. 39.

See the adverse criticism of the principal case in Hare on Contracts, pp. 180, 318–325.

Notice of acceptance was said (obiter) to be required, by Story, J., in Douglass v. Reynolds, 7 Pet. 126, 8 L. Ed. 626 (1833), on the supposed authority of Russell v. Clark, 7 Cranch, 69, 3 L. Ed. 271 (1812), Edmondston v. Drake, 5 Pet. 624, 8 L. Ed. 251 (1831), Oxley v. Young, 2 H. Bl. 613 (1796), and Peel v. Tatlock, 1 Bos. & Pull. 419 (1799).

Subsequently and distinctly deciding that notice is requisite is the case of Adams v. Jones, 12 Pet. 207, 9 L. Ed. 1058 (1838), opinion by Story, J., with Baldwin, J., dissenting.

The origin of the rule expressed in the principal case is perhaps to be found in the frequent practice of merchants to write letters offering to indorse or accept bills of exchange for accommodation. See the cases referred to in Mathews v. Chrisman, 20 Miss. 595, 51 Am. Dec. 124 (1849).

Unless the bill was presented for signature within a reasonable time there could be no liability (of course none on the bill) upon the simple contract. Payne v. Ives, 3 D. & R. 664 (1823), supra.

When, therefore, cases arose where the offer was to guarantee credit to a certain amount, without offering to accept or indorse commercial paper, though English courts never have required notice of acceptance (the detriment incurred on request creating the assumpsit), American courts have assimilated such an offer to the case of Payne v. Ives, and, though no acceptance or indorsement was necessary to create a liability, they have held very frequently, as in the principal case, that notice of acceptance must be given.

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provided; but that the said promise in the declaration mentioned was contained in a certain memorandum in writing, signed by the defendant, and which was as follows:

"I hereby guarantee to you the payment of the proceeds of the goods you have consigned to my brother, John Tooth, of Sydney, in your ship the John Woodall, Captain Henderson, and also any future shipments you may make to him, in consideration of the sum of 2s. 6d. paid me, which I hereby acknowledge to have received."

And that the defendant was ready to verify.

Demurrer and joinder.

Gurney appeared for the plaintiff, but the court called on

Barstow, who was for the defendant, to support the plea. He objected to the guaranty that it ought to show a consideration moving from the plaintiff, and it did not appear on this instrument who paid the defendant the 2s. 6d.

TINDAL, C. J. The fair intendment of the whole is that it was paid by the plaintiff to the defendant. Why should anybody go out of his way to pay for the plaintiff?

Judgment for plaintiff. [41]

[41] Accord: Solary v. Stultz, 22 Fla. 263 (1886).

In Lawrence v. McCalmont et al., 2 How., at page 452, 11 L. Ed. 326 (1844), Mr. Justice Story said: "The fifth point is that there is no valid consideration to support the guarantee. This is pressed under two aspects: The first is that the consideration was past, and not present; for the letter of credit had been already delivered to J. and A. Lawrence by the agents of the London house. The second is that the payment of the one dollar is merely nominal, and not sufficient to sustain the guarantee, if it had been received; and it is urged that it was not received. As to this last point, we feel no difficulty. The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guarantee as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid."

Similarly a consideration of only $1 was held sufficient in Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504 (1887).

"The bond of the surety company differs in two important particulars from the usual simple obligation of the individual surety: First. It is issued, not gratuitously, or as a friendly act, but for full compensation received by the surety, the premium, moreover, being fixed by the company. Second. Prepared by the company and in its interest, the contract contains numerous clauses restrictive of the company's liability. These conspicuous differences have induced the courts to construe the contract of the surety company as one of insurance rather than as one of suretyship, and to establish the rule that all ambiguities in the language employed must be resolved in favor of the insured and against the insurer." Richards on Insurance, pp. 655, 666.

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OFFORD v. DAVIES et al.

(Court of Common Bench, 1862. 12 C. B. [J. Scott (N. S.)] 748.)

This was an action upon a guarantee.

The first count of the declaration stated that by a certain instrument in writing, signed by the defendants and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised and agreed with the plaintiff in the words and figures following, that is to say: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guaranty for the space of twelve calendar months the due payment of all such bills of exchange, to the extent of £600. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys."

Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored, and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit, and that all things had happened and all times had elapsed necessary, etc., yet that the defendants broke their said promise, and did not pay to the plaintiff or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof, whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys if the said bills had been duly paid at maturity.

Fourth plea, to the first count, so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange and the said sums so advanced, that, after the making of the said guarantee, and before the plaintiff had dis-

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counted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guarantee, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the fourth plea offers no defense to that part of the declaration to which it is pleaded, for that a party giving a guarantee (for a definite period) has no power to countermand it without the assent of the person to whom it is given."

Joinder. [42]

ERLE, C. J., now delivered the judgment of the court.[43]

The declaration alleged a contract by the defendants, in consideration that the plaintiff would at the request of the defendants discount bills for Davies & Co., not exceeding £600., the defendants promised to guaranty the repayment of such discounts for twelve months, and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that consequently the plea is good.

This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.[44]

[42] The arguments of counsel are omitted.

[43] The reporter notes that "the case was argued before Erle, C. J., Williams, J., Willes, J., and Byles, J."

[44] "The difference between contracts which become valid on assent, and those which derive their obligation from the passage of a consideration, is marked by this decision [i. e., Calvert v. Gordon, 3 M. & R. 124 (1828), see post, p. 381] with great distinctness. A covenant to be answerable for such defaults as may be committed by a third person during his continuance in the employment of the covenantee cannot be annulled by the covenantor without the consent of the other party to the obligation. In Calvert v. Gordon the bond sued on was conditioned for the fidelity of one Edwards as collecting clerk of the plaintiffs while he should continue in their service. The obligor

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CHAPTER III

GENERAL ESSENTIALS TO THE FORMATION OF ALL CONTRACTS OF SURETYSHIP

SECTION 1.—CAPACITY—PERSONAL INCAPACITY OF PRINCIPAL

GOODELL v. BATES et al.

(Supreme Court of Rhode Island, 1883. 14 R. I. 65.)

Exceptions to the Court of Common Pleas.

DURFEE, C. J. This case comes up on exceptions from the court of common pleas. It is debt on a replevin bond; the defendant in replevin, who is the plaintiff here, having recovered judgment for return and restoration. The writ of replevin was defective, in that it omitted the words "original writ" in the proviso or exemption clause. In Parker v. Palmer, 13 R. I. 359, this court held that such an omission, objected to by the defendant, was fatal to the writ without amendment. The court did not hold that the writ was utterly void, for, if it had so held, it could not have permitted an amendment. We do not think the defect is one of which the plaintiff in replevin, who is himself responsible for it, can take advantage; but, on the contrary, we think a judgment for return and restoration is good against the plaintiff in replevin, in spite of the defect. The first three exceptions must therefore be overruled.

died after the execution of the bond, and the defendant, as his executrix, thereupon gave notice that she would no longer be responsible for the good conduct of Edwards, and that if the plaintiffs continued to employ him they must take the risk. The only difference between this case and Offord v. Davies arose from the seal. The court held that the guarantor might have stipulated that he should be entitled to withdraw on notice. He had not done so, and had, on the contrary, covenanted to be answerable during an indefinite period. Such engagement was obligatory, and must be observed. An application was subsequently made for relief in equity without success. The result of the authorities, therefore, is that, inasmuch as a guaranty under seal is binding immediately upon delivery and acceptance, it cannot be recalled by the covenantor, even when conditioned for the performance of some act by the covenantee which constitutes its consideration, or more properly cause, and which the latter may omit or fulfill at pleasure. An unsealed guaranty, on the other hand, does not become obligatory until a consideration moves from the creditor, and a revocation will consequently be in time down to the last moment before he gives or agrees to give the credit required by the guarantor." Hare on Contracts, pp. 310, 311.

See, also, note in 13 H. L. R. 216, on "Revocation of Guaranty by Death of Guarantor."

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The action of replevin was brought against the plaintiff by Adolphus D. Putnam and Fannie M. Putnam, his wife. The bond was signed by said Adolphus and Fannie as principals, and by William R. Page and Israel G. Bates as sureties. The writ here was sued out against all four, but was only served on Page and Bates, and Bates alone answered the case. On the trial evidence was adduced to show that Fannie M. Putnam, when she signed the bond, was not only a married woman, but also an infant. The fourth and fifth exceptions are for the refusal of the court below to rule that a replevin bond given by an infant is voidable by such infant, and that such a bond, if voidable, is insufficient. We do not think the refusal was error, or at least material error, because we think that, if the infant was not bound, the other obligors were nevertheless liable; the right to take advantage of the disability being confined to the infant and the defendant in replevin. The bond was voluntarily given, and to allow the obligors, who were sui juris, to set up the disability of a co-obligor to defeat it, would be to allow them to take advantage of their own wrong. The bond is good at common law, if not under the statute. Morse v. Hodsdon, 5 Mass. 314; Simonds v. Parker, 1 Metc. (Mass.) 508; Bigelow v. Comegys, 5 Ohio St. 256; Burgess v. Merrill, 4 Taunt. 468; Hartness v. Thompson, 5 Johns. (N. Y.) 160. Any technical objection to the joinder of the infant or feme covert, such as is noticed in Porter v. Bradley and Wife, 7 R. I. 538, is obviated by the statute. Pub. St. R. I. c. 204, §§ 31, 32, 34. And the same statute obviates the other objections in regard to the misjoinder of parties made by exception or motion in arrest of judgment. The sixth exception must be overruled for substantially the same reasons for which the fourth and fifth are overruled. * * *[1]

JOHN WINN v. SANFORD.

(Supreme Judicial Court of Massachusetts, 1887. 145 Mass. 302, 14 N. E. 119. 1 Am. St. Rep. 461.)

Contract against the surety upon the following bond, executed by Susan B. Winn as principal and by the defendant as surety:

"Know all men by these presents, that we, Susan B. Winn, wife of John Winn, of Nantucket, as principal, and Frederick C. Sanford, of Nantucket, as surety, are holden and stand firmly bound unto John Winn, of Nantucket, above named, in the sum of three hundred dollars, to the payment of which to the said John Winn, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves,

[1] Only so much of the opinion is printed as relates to the question of capacity.

As to coverture of principal, accord: Wagoner v. Watts, 44 N. J. Law, 126 (1882).

As to infancy of principal, accord: Dexter v. Blanchard, 11 Allen (Mass.) 365 (1865), obiter.

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our heirs, executors, and administrators. The condition of this obligation is such that, whereas, in a settlement of differences between said John Winn and Susan B. Winn, it was agreed by said Susan B. Winn, and on her behalf that she should give to said John Winn a bond, with surety, 'to release dower whenever requested, and make no further claim on said John Winn for any support or for any cause whatever': Now, therefore, if said Susan B. Winn shall, whenever requested, sign release of dower in any real estate of said John Winn, and shall make no further claim upon him for any support or for any cause whatever, then this obligation shall be void; otherwise, it shall be and remain in full force and virtue."

Trial in the superior court, without a jury, before Thompson, J., who ruled, as matter of law, "that the bond sued on cannot be made the basis of any legal claim against the defendant; that, Mrs. Winn not being liable to her husband under it, the defendant is not liable"—and found for the defendant. The plaintiff alleged exceptions.

DEVENS, J. It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case, he is, in a certain sense, an independent promisor, and must perform his promise.

In Maggs v. Ames, 4 Bing. 470, the defendant had guaranteed the purchases made by a married woman incapable of making a contract. The question in the case was whether this guaranty should have been in writing; but it is assumed throughout, by court and counsel, that, if it had been in writing, the defendant would have been liable, although there could have been no liability on the part of the principal.

In a similar manner, where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee. Yale v. Wheelock, 109 Mass. 502.

The bond in the case at bar is several, as well as joint. It appears from it that Mrs. Winn is the wife of the obligee, and it recites the agreement made between them. This agreement made by her is void, so far as the case now discloses, solely because of her incapacity to contract; but this should not release the defendant from his engagement that she should perform the promise made by her. The defense which Mrs. Winn personally has, resulting from her situation, should not be open to him.

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Nor do we perceive that any distinction can be made, as suggested by the defendant, between the promise of a married woman, which is void, and that of a minor, which is voidable. In either case, the surety assures the promisee against the incapacity of the principal to make a legal contract, whether it be more or less incomplete.

The cases in which it has been held that the coverture of the principal promisor at the time of making her promise will not discharge the surety, when such coverture was known to him, are numerous, and have arisen on many descriptions of contract. Smyley v. Head, 2 Rich. Law (S. C.) 590, 45 Am. Dec. 750. Kimball v. Newell, 7 Hill (N. Y.) 116. Nabb v. Koontz, 17 Md. 283. Jones v. Crosthwaite, 17 Iowa, 393. Weed Sewing Machine Co. v. Maxwell, 63 Mo. 486. St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295. Davis v. Statts, 43 Ind. 103, 13 Am. Rep. 382. Stillwell v. Bertrand, 22 Ark. 375.

Exceptions sustained.[2]

ROBBINS et al. v. ROBINSON et al.

(Supreme Court of Pennsylvania, 1896. 176 Pa. 341, 35 Atl. 337.)

Assumpsit for goods sold to the Philadelphia Optical & Watch Company, Limited, upon written guaranty, before Sulzberger, J.

The plaintiff offered in evidence the following agreement:

"We hereby agree to extend the Philadelphia Optical & Watch Company, Limited, a line of credit not to exceed forty thousand dollars ($40,000.00), upon condition that Jos. W. Robinson and A. H. Williams & Sons go their security for that amount.

"We do further agree that said forty thousand dollars ($40,000.00) line of credit shall extend over a period of four (4) years, with the understanding that it be reduced at the rate of ten thousand dollars ($10,000.00) each year, paid in quarterly payments of two thousand five hun-

[2] In many decisions it does not appear whether or not the surety was aware of the disability, yet he is held liable. See Ames' Cases on Suretyship, p. 110, note 3.

The doctrine is in accord with the Roman and civil law. In the Roman law the contract of suretyship was called "fidejussio." "It is immaterial even whether the principal obligation be civil or natural, so that a man may go surety for the obligation of a slave either to a stranger or to his master." Inst. bk. III, tit. XX.

Code Civil, art. 2012: "Le cautionnement ne peut exister que sur une obligation valable.—On peut néanmoins cautionner une obligation, encore qu'elle peut etre annulée par une exception purement personelle a l'obligé; par example, dans le cas de minorité."

Article 2036: "La caution peut opposer au créancier toutes les exceptions qui appartiennent au débiteur principal, et qui sont inhérentes à la dette;—mais elle ne peut opposer les exceptions qui sont purement personnelles au débiteur."

In the following cases the surety seems to have been aware of the incapacity of the principal and hence a fortiori the defense was rejected: Wiggins' Appeal, 100 Pa. 155 (1882); Yale v. Wheelock, 109 Mass. 502 (1872); Winn v. Sanford, 145 Mass. 302, 14 N. E. 119, 1 Am. St. Rep. 461 (1887); St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295 (1857).

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dred dollars ($2,500.00) every three (3) months. Distribute $2,500 on notes as they fall due.

"We further agree to accept a note, or notes, of the said Philadelphia Optical & Watch Company, Limited, in payment of our statement rendered about the first of each month for all goods bought during the preceding month, granting the usual five per cent. thirty days' discount from statement rendered in consideration of the fact that our notes bear legal interest (six per cent.).

"We further agree to renew and extend any, or all, notes that may fall due provided the money owed us by The Philadelphia Optical & Watch Company, Limited, does not amount to more than the forty thousand dollars ($40,000.00) above mentioned, or the amount it may have been reduced to in the meantime according to contract.

"We accede to above in consideration of the subjoined guaranty and payment for first bill of $20,000, one half cash; all future purchases exceeding the credit to be paid for in cash.

"Robbins & Appleton,

"Dated September 24, 1890. By F. R. A.

"Having carefully read above contract, we guarantee to protect any bill the Philadelphia Optical & Watch Company, Limited, may buy of Robbins & Appleton to an amount not exceeding forty thousand dollars ($40,000.00), provided said liability of the Philadelphia Optical & Watch Company, Limited, be reduced at the rate of ten thousand dollars ($10,000.00) a year, so that for one year from signing of articles we are liable to said Robbins & Appleton, for goods purchased by the Philadelphia Optical & Watch Company, Limited, to the extent of forty thousand dollars ($40,000.00). After the first year shall have elapsed and from then on until the second year shall have elapsed, we are liable only for thirty thousand dollars ($30,000.00); after the second year shall have elapsed and until the end of the third year, we are liable only for twenty thousand dollars ($20,000.00); and after the third year on until the fourth year shall have elapsed, we stand liable only for ten thousand dollars ($10,000.00), after which time we will not agree at present to hold ourselves responsible.

"Jos. W. Robinson,

"Arthur H. Williams & Sons."

The other facts sufficiently appear in the opinion of the Supreme Court.

The court entered a compulsory nonsuit.[3]

Mr. Justice MITCHELL. * * * There remains one question which is not without difficulty. The Watch Company, Limited, was formed under the act of June 2, 1874 (P. L. 271), the amendment of

[3] The opinion of the lower court and the arguments of counsel are omitted, as also the portion of the opinion of Mitchell, J., which deals with the question whether the contract related only to the giving of a note for the bill, or whether the words "protect any bill" meant that the defendant would see that the bill was paid—the latter being the court's construction of the contract.

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May 10, 1889 (P. L. 183), to which provides that no liability greater than $500 shall bind the association unless reduced to writing and signed by at least two managers. Whether the orders for goods which created the debt in the present case were signed by two managers or not does not appear in the evidence; but it is argued for the appellees that, the notes not having been shown to have been so signed, there was no legal liability of the Watch Company proved, and therefore no such liability on the part of the sureties. Very important questions might arise in view of the purpose of that requirement of the statute being for the protection of the members of the limited partnership whether it could be treated as mandatory if all the managers did in fact authorize the debt, though not in writing, and further whether any one but the association itself could raise the objection, which it has not done in the present case. But it is not necessary to decide either of these questions, as even conceding them to the appellees the latter would not necessarily be relieved of liability.

As already said, the guaranty of the defendants was not of the notes, but of "any bill the Watch Company may buy," and its fair meaning is that if the Watch Company should not pay the guarantors would. The plaintiffs showed that the Watch Company did buy, did receive the goods, and had not paid. This made out a prima facie case of breach of the warranty, and called upon the guarantors to show a defense if any they had. It was not essential that the debtor should be legally bound. If the proposed sale had been to an infant, or a married woman prior to the recent enabling acts, and, on a guaranty of any bill which either might buy, the vendors had parted with their goods, the liability of the guarantors would be clear, though there was no legal liability of the principal debtor. It is a question of the intention of the parties, and the language of the present guaranty, "to protect any bill the Watch Company may buy," is broad enough to cover any failure of the Watch Company to pay, no matter what the reason, unless it went to the merits of the plaintiffs' claim.

Judgment reversed, and procedendo awarded.[4]

[4] Similarly the lack of power to execute an instrument by one assuming to be an agent has been regarded as no defense: "Ferguson being without authority to execute the bond on behalf of Mrs. Foster, the question then arises as to the effect of that want of authority on the liability of McManus. * * * Here it must be held that as a matter of law both McManus and Brown were bound to know that the signature of Mrs. Foster's name by Ferguson was unauthorized. * * * We think McManus must be held to have executed the obligation voluntarily and absolutely, and that the want of execution by Mrs. Foster is in itself no defense for McManus." Luce v. Foster, 42 Neb. 818, 830, 60 N. W. 1027 (1894).

See, however, Ferry v. Burchard, 21 Conn. 597 (1852), where the surety on a void recognizance, taken by a justice of the peace, who ordered a recognizance different from that prescribed by statute, was not liable.

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DUTT v. ADMINISTRATOR-GENERAL OF BENGAL.

(Privy Council on Appeal from the East Indies, 1908. L. R. 35 Indian App. Cas. 109.)

On appeal from the High Court in Bengal.[5]

The judgment of their Lordships was delivered by

Lord MACNAGHTEN. This is an appeal from the High Court of Judicature at Ft. William in Bengal.

The appellant, Debendra Nath Dutt, was one of two sureties in a bond conditioned for the due administration by Ernest Hardwicke Cowie, a solicitor in Calcutta, of the estate of a retired Indian civil servant named Craster. Mr. Craster died in England in August, 1898, leaving a will which was duly proved here in the following month of October. Part of the deceased's estate consisted of shares in the Bank of Bengal and other Indian assets. The Indian assets escaped the notice of the executors and remained unclaimed and outstanding. On July 29, 1902, Cowie, who is stated in the printed cases to have been one of the solicitors to the government, and who certainly was then in good credit, obtained an order for the grant of letters of administration to himself as attorney for a fictitious person, represented by him to be the only son and sole next of kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on August 15, 1902, on the production of a bond in the usual form, executed by Cowie and the two sureties, who received a small payment for their services, but were not themselves parties to the fraud or cognizant of it. By these means Cowie obtained possession of the bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was not discovered till the end of 1903 or the beginning of 1904. Cowie then absconded. He was apprehended, tried, and convicted. The grant of administration in his favor was canceled, and in May, 1904, letters of administration with a copy of the will annexed were granted to the Administrator-General of Bengal. The bond of August 15, 1902, was then assigned to the Administrator-General, and he brought this suit against Cowie and Cowie's sureties. Cowie made no defense. The suit was heard by Sale, J. That learned judge pronounced a decree in favor of the Administrator-General, the result of which, so far as regards the sureties, was that they were ordered to pay to the administrator a sum equal to the amount of the proceeds of the bank shares misappropriated by Cowie, together with interest and costs. Both the sureties appealed to the High Court. But that court in its appellate jurisdiction by a majority affirmed the order of Sale, J., and dismissed the appeal, with costs.

The case of the appellant, Dutt, who alone has appealed to his Majesty, as presented to this board, was that the letters of administration granted to Cowie having been annulled by the court on the ground of

[5] The statement of facts and the arguments of counsel are omitted.

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fraud, must be regarded as a mere nullity from the beginning; that Cowie, therefore, never was administrator; and that the bond, so far as the sureties were concerned, was void and of no effect, for the sureties undertook to be responsible for a real administrator, not for a person assuming to act in a capacity which he never possessed and which the court could not have conferred upon him. The case was argued very ably by the learned counsel for the appellant, who said everything that could be said on his behalf. But there is really no substance in the appellant's contention. So long as the letters of administration granted to Cowie remained unrevoked, Cowie, although a rogue and an impostor, was to all intents and purposes administrator. He, and he alone, represented the deceased in India. His receipts were valid discharges for all moneys received by him as administrator. As administrator he collected the assets belonging to the deceased in India, and he misappropriated the assets which he so collected. For his acts and defaults as administrator the appellant and his cosurety became and must remain responsible.

Their Lordships are therefore of opinion that Maclean, C. J., and the learned judges who concurred with him, were perfectly right, and they will humbly advise his Majesty that the appeal must be dismissed.

The appellant will pay the costs of the appeal.[6]

SECTION 2.—THE EFFECT OF FRAUD

MARCHMAN v. ROBERTSON, TAYLOR & CO.

(Supreme Court of Georgia, 1886. 77 Ga. 40.)

Before Judge Carswell, in Jefferson Superior Court, November Term, 1885.

BLANDFORD, Justice. The defendants in error sought to foreclose a mortgage on the lands of plaintiff in error. She appeared and answered the rule nisi, and in her answer alleged that she was only a security on the note which the mortgage was given to secure, for one Cook, who was principal in the note, and that she was induced to sign said note by reason of the false and fraudulent representations of the defendants in error, by their accredited agent, that they would furnish Cook

[6] Even where there is no jurisdiction whatever in the court appointing the principal, his surety has been held liable, on the doctrine of estoppel by deed. See Hoffman v. Fleming, 66 Ohio St. 143, 64 N. E. 63 (1902), wherein many American authorities in accord are collected.

Contra: Thomas v. Burrus, 23 Miss. 550, 55 Am. Dec. 154 (1852).

The doctrine of estoppel by deed was applied to a recital of the existence of a corporation in Allen v. Hopkins, 62 Kan. 175, 61 Pac. 754 (1900).

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with a certain fertilizer to sell in certain territory covered by certain railroads in this state; that Cook had placed two hundred and fifty tons of this fertilizer, but that the mortgagees had failed and refused to furnish Cook with the same, which, if they had done, he would have been enabled to have paid the note and saved her harmless. Upon demurrer, the court struck this answer, and the plaintiff in error excepted to this ruling, and the same is assigned here as error.

Was the conduct of the defendants in error, as set forth in the answer, calculated to injure the surety or increase her risk, or does it expose her to greater liability? If so, it will discharge her as such surety. Code, § 2154.

If the allegations contained in the answer are true, and they are to be taken as true by the demurrer, the failure of the payees in the note to furnish Cook with fertilizers deprived him of the means whereby he could have paid the note. This exposed Mrs. Marchman to greater liability, and increased her risk, and, under the Code, she was thereby discharged as surety. This is not an attempt to add to, contradict, or vary a written contract, but merely to show acts and conduct on the part of the payees which increased the risk of the surety, and which exposed her to greater liability, or to show fraud, by which she was induced to become surety.

If she was induced to become surety for Cook by the false and fraudulent representations (as she alleges) of the defendants in error, then this was a fraud upon her, and makes void her contract of suretyship, for fraud vitiates all contracts. In any view which we can take of the answer, we think the court erred in sustaining the demurrer thereto and striking the same.

Judgment reversed.

STONE et al. v. COMPTON.

(Court of Common Pleas, 1838. 5 Bing. N. C. 142.)

TINDAL, C. J.[7] The main question in this case, and which arises upon the first plea to the count upon the promissory note, is this: Whether the promissory note was obtained from the defendant under circumstances which are deemed in law to amount to covin (for there is no suggestion whatever of any intentional fraud or misrepresentation on the part of the plaintiffs personally), so as thereby to avoid the validity of the security in the hands of the plaintiffs.

The promissory note having been given by the defendant as a security for the debt of Messrs. Coxe and Chambers, and the note still remaining in the hands of the plaintiffs, the original payees, the consideration upon which it was given to them, and the several circumstances under which the defendant was induced to enter into it, are

[7] The facts appearing sufficiently clear in the opinion, the statement of facts contained in the "special case" has been omitted, and also the arguments of counsel.

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the subject of inquiry and investigation in the present action. And with respect to the nature of such inquiry, and its bearing and effect on the validity of the instrument, we cannot see any sound legal distinction arising from the form of the security itself; that is, whether such security is taken in the form of a promissory note, or as an ordinary guaranty for the payment of the debt of a third person. For the liability of the maker of the note, and of the guarantor, depends precisely on the same event, namely, the default of the principal debtor to make good his payment, and the extent of the surety's liability is precisely the same on either instrument; so that there seems no reason, and no authority has been cited to the effect, that the validity of the two instruments should not stand upon precisely the same footing, so far as depends on the circumstances under which the same were given.

Now the principle to be drawn from the cases to which reference has been made in the course of argument we take to be this: That if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law, on the ground of fraud.

The question therefore becomes this: Whether, upon the facts stated in the special case, there appears to have been any such misrepresentation on the part of the plaintiffs?

It is perfectly true, as urged by the counsel for the plaintiffs, that the agreement between the plaintiffs and Coxe and Chambers, under which the former were to be allowed to deduct out of the advance of the £2,600. the old debt of £800., due from Coxe on his separate account, was entered into before any application had been made to the defendant to become surety, and also that Coxe and Chambers never communicated to the defendant until long after the transaction that any such arrangement had been made, or indeed any other than that the plaintiffs were simply to lend them £2,600.; and if the matter had rested here, no objection, either on the ground of suppression or misrepresentation, could have been urged against the validity of the note. The plaintiffs were not to be made responsible for the communication, or want of communication, between their debtor and the surety, unless they are shown to be agreeing to it; and for anything which appears, as to this part of the transaction, they were ignorant that a correct statement had not been made to the defendant. But it appears from the special case that, at the time of signing the note, the principal debtors, Coxe and Chambers, and the defendant were at the office of the plaintiffs' attorney, where the deed of the 25th of November was read over in their presence; the case stating expressly "that before the defendant signed the promissory note, the recitals of the deed were read over to him," and that upon the same occasion, and before

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the note was signed by the defendant, the memorandum was indorsed upon the note, stating that the sum mentioned in it was the same sum as that mentioned in the deed.

Now we think the construction, and the only construction, which can be put upon the recitals in the deed, is that the former debt of £800., due to the plaintiffs from Coxe on his separate account, and the repayment of which was secured by Coxe's policy for £1,500., had been, at that time, paid by Coxe to the plaintiffs, and that the sum agreed to be advanced by the plaintiffs to Coxe and Chambers upon a new loan was the full and entire sum of £2,600. We cannot consider these recitals in any other light than as a direct representation made to the defendant before the note was signed, not indeed personally by themselves, but by the agents of the plaintiffs employed in carrying the negotiation for the loan into effect, and consequently by whose acts the plaintiffs are bound, and that this representation was untrue in a material respect, namely, that the private debt of Coxe had not been paid at the time of the execution of the deed, and that the entire sum of £2,600. was, by the private stipulation between the parties, not to be advanced to, or placed to the credit of, Coxe and Chambers, but only the sum of £2,600. minus the amount of the debt due from Coxe to the plaintiffs.

And we think ourselves bound, upon every legal principle of reasoning, to assume that, as the defendant was present when the recitals of the deed were read over to him, he must have signed the note with a full knowledge and understanding of the facts therein stated, and in the faith and confidence that the statement was true. The recitals were read over to him for the purpose of making him acquainted with the state of the account between Coxe and Chambers and the plaintiffs, and with the collateral securities given by Coxe and Chambers, which he, the surety, might, if it became necessary, call to his aid and indemnity; and his attention must have been called to the recitals in the deed by the circumstance of the memorandum indorsed on the note, which could be placed there for no other purpose than to connect the note with the transaction stated in the deed.

Then, as it appears to us that the representation as to the repayment of the debt due from Coxe, and the amount of the new loan to Coxe and Chambers, was untrue, and that such misrepresentation related to a fact material to the surety's interest, we think the promissory note is thereby void. And such being our opinion on this point, it becomes unnecessary to discuss the second objection which has been urged, as to the misrepresentation in the recitals of the deed, of the then existing state and value of Coxe's policy, on which point, however, if it had been necessary, we should have been ready to declare our opinion.

We think, therefore, a nonsuit should be entered.

Judgment of nonsuit.[8]

[8] Accord: Pidcock v. Bishop, 3 L. J. Rep. (K. B.) 109 (1825); Jackson v. Duchaire, 3 T. R. 551 (1790); Stiff v. Local Board of Eastbourne, 19 Law Times

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REMINGTON SEWING MACH. CO. v. KEZERTEE et al.

(Supreme Court of Wisconsin, 1880. 49 Wis. 409, 5 N. W. 809.)

Appeal from the Circuit Court of Winnebago County.

LYON, J.[9] The law is that if a person who contemplates becoming surety to another for the payment of money or the performance of any act by a third person applies to the creditor or person to whom the security is to be given for information as to the nature, extent and risk of the obligation, or the circumstances, condition or character of such third person, the creditor, if he undertakes to give the information, is bound to disclose every material fact within his knowledge affecting the proposed liability. If the creditor conceal any fact unknown to the proposed surety, which, had he known it, would have deterred him from becoming surety (the latter not having the present means of ascertaining the fact, or, having such means, if artifice be used to mislead him or throw him off his guard), it is a fraud upon him, and relieves him from his obligation. Especially is this so where the obligation of suretyship is entered into at the request of the person to whom the security is given. In such a case perfect good faith is required of him who is to be benefited by the transaction, if he assumes to give the information; and if that obligation is not observed by him (the surety not having other present means of information), the creditor cannot successfully invoke the protection of the maxim "caveat emptor" to shield him from the consequences of his fraud.

If authority is required for a proposition so obviously reasonable and just, the cases which support it (some of them in this court) will be found cited in the briefs of the respective counsel for the defendants. The person to whom the security is proposed to be given may refuse to give any information, and, if he so refuses, the maxim "caveat emptor" applies. The surety then incurs the liability at his own risk. The charge of the learned circuit judge does not, in express terms, contain this qualification; but on the facts of the case the omission is immaterial, for the reason that the uncontradicted evidence shows that the defendants went to the office of Barr & Konrad for the express purpose of obtaining information from the agent of the company of their financial condition, and under the charge the jury must have

(N. S.) 408 (1868), concealment of fact that another surveyor would act in connection with one named in the agreement; same case affirmed on appeal, 20 Law Times (N. S.) 339 (1869); First Nat. Bank v. Terry (C. C.) 135 Fed. 621 (1905); Owen & Gutch v. Homan, 4 H. of L. Cases, 997, 10 Eng. Rep. Reprint, 752 (1853); Ham v. Greve, 34 Ind. 18 (1870).

"The mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose and the fact that it was intended to be so applied do not appear to me to vitiate the transaction at all. If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have affected the transaction." Hamilton v. Watson, 12 Cl. & Fin. 118 (1845).

[9] Only the opinion of the court has been printed.

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found that the agent assumed to give them such information. In all other respects the charge seems to be in strict accord with the principles above stated, as also are the refusals to give certain instructions proposed on behalf of the plaintiff.

It was claimed in argument that the testimony tended to show that the books of Barr & Konrad showed that they had indorsed or guaranteed the notes of the company theretofore taken by them for machines, and hence that the defendants had the present means of knowing the fact. That question was submitted to the jury, and there is sufficient evidence to warrant a finding that the books did not show such liability. The defendants both testified that had they known of that liability they would not have signed the guaranty. This was competent testimony to go to the jury. Assuming the defendants to be men of ordinary caution and prudence, it is easy to believe that they testified truly. Upon the whole case we are impelled to the conclusion that the judgment should not be disturbed.

By The Court. Judgment affirmed.[10]

[10] Fraud may consist of concealment of material facts from the prospective surety by the prospective creditor; but such facts are practically limited to the principal's dishonesty. Smith v. Bank of Scotland, 1 Dow. 272 (1813); Railton v. Mathews, 10 Cl. & Fin. 934 (1844); United States Life Ins. Co. v. Salmon, 91 Hun, 535, 36 N. Y. Supp. 830 (1895); Belleview. etc., Ass'n v. Jeckel, 104 Ky. 159, 46 S. W. 482 (1898); Wilson v. Town of Monticello, 85 Ind. 10 (1882); Guardian, etc., Co. v. Thompson, 68 Cal. 208, 9 Pac. 1 (1885); Franklin Bank v. Cooper, 36 Me. 179 (1853).

As to many facts which might influence the surety, there is no duty of disclosure—e. g., insolvency of principal, Bank of Monroe v. Anderson Bros., 65 Iowa, 692, 22 N. W. 929 (1885); Ham v. Greve, 34 Ind. 18 (1870), North Brit. Ins. Co. v. Lloyd, 10 Exch. 523; or a prior indebtedness of the principal to the creditor, Hamilton v. Watson, 12 Cl. & Fin. 102 (1845); Palatine Ins. Co. v. Crittenden, 18 Mont. 413, 45 Pac. 555 (1896); Farmers', etc., Bank v. Braden, 145 Pa. 473, 22 Atl. 1045 (1891); or that the principal engaged in gambling unconnected with his employment, Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231 (1869)—unless asked in regard to such facts; but, if asked by the surety, the creditor should fully disclose his knowledge upon everything inquired about likely to influence the prospective surety's action. Remington Sewing Machine Co. v. Kezertee, 49 Wis. 409, 5 N. W. 809 (1880), supra.

A duty to speak may also exist where the prospective guarantee has stated a fact or an intention as existing, and subsequently knows that such fact or intention no longer exists. Davies v. London, etc., Co., 8 Ch. Div. 469 (1878).

In Smith v. Josselyn, 40 Ohio St. 409 (1884), "culpable carelessness" of the principal in losing moneys while previously in the creditor's employ imposed a duty of disclosure.

The subject of fraud in its relation to the contract of suretyship has been clearly stated by Fry, J., in Davies v. London, etc., Co., 8 Ch. Div. 469 (1878), as follows: "Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose to show that the duty existed. Now undoubtedly that duty does in many cases exist. In the first place, if there be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and cestui que trust, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the agent, by the solicitor, by the guardian, or by the trustee. The pre-existing relationship involves the duty of entire disclosure. In the next place, there are certain contracts, which have been called 'contracts uberrimæ fidei' where, from their nature, the court re-

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WILMINGTON, C. & A. R. CO. v. LING et al.

(Supreme Court of South Carolina, 1882. 18 S. C. 116.)

Before Wallace, J., at Darlington, September, 1881.

An action by the plaintiffs against Joseph J. Ling, Isaiah L. Wright, James M. Hunter, and Ira M. Harrell, commenced August 20, 1878. The opinion states the case.

The opinion of the court was delivered by Mr. Chief Justice SIMPSON.

The plaintiff, appellant, a railroad corporation under the laws of this state, employed the defendant, Joseph J. Ling, to act as their agent at Timmonsville, in the county of Darlington. Some four months after the said Ling had been acting as such agent, to wit, on May 1, 1870, he executed and delivered to the plaintiff a bond with the other parties named as his sureties, conditioned generally for the faithful discharge of his duties, and especially that he would well and truly account for and pay over to the said company all moneys that might

quires disclosure from one of the contracting parties. Of that description there are well-known instances to be found. One is a contract of partnership, which requires that one of the partners should disclose to the other all material facts. So in the case of marine insurance, the person who proposes to insure a ship or goods must make an entire disclosure of everything material to the contract. Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties had made a statement which is false in fact, but which he believes to be true, and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement, although, if he had said nothing, he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which is true at the time, but which during the course of negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances. It has been argued here that the contract between the surety (for in fact Davies was a surety for Evans) and the creditor is one of those contracts which I have spoken of as being uberrimæ fidei, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure. * * * Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid."

In Hamilton v. Watson, 12 Cl. & Fin. 117 (1845), Lord Campbell said: "I will venture to say, if your Lordships were to adopt the principles laid down and contended for by the appellant's counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept, whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings, whether he performed his promises in an honorable manner; for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think

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come into his hands, or for which he might be accountable by reason of his appointment.

At the time this bond was given Ling was behind some $497.40. The testimony does not show whether the sureties were aware of this fact, or not, when they executed the bond. Ling continued in office until February 17, 1873, when he was dismissed, at which time he was a defaulter to the amount of $1,737.48, which sum was afterwards reduced by certain cash receipts to $1,526.57. The account between Ling and the company, introduced in evidence, embracing his monthly standing, showed that he was frequently behind from the beginning of his agency. These sums had been carried forward until finally, upon his dismissal, after the credits above referred to had been allowed, the balance against him amounted to $1,526.57. For this balance the action below was brought on the bond of indemnity.

Wright, one of the sureties, was never made a party, and Ling died before the trial, so that at the trial the action stood against the two sureties, Hunter and Harrell. These defendants relied upon two defenses: First. "That Ling, before the execution of the bond sued on, having been agent of the appellants at Timmonsville, had committed default by failing to pay over moneys collected, and was indebted, when the bond was executed, in a considerable sum by reason of said default; that the appellants, knowing these facts, concealed the same from the defendants Hunter and Harrell, and impliedly held out Ling as a trustworthy person and competent agent, when they knew or had reason to believe the contrary." Secondly. "That shortly after the execution of the bond Ling made default as agent, and thereafter continued to make defaults by failing to pay over money collected by him; that these facts were known to the appellants, but, instead of dismissing Ling from their employment, they gave no notice to his sureties, condoned his faults, connived at the same, and continued him in their employment as agent." The defendants claimed that, on the first ground, the bond was void as to them, and, on the second ground, that if ever liable on the bond they had been discharged from that liability by the fraudulent conduct of the appellants. The action was submitted to a jury under the charge of the presiding judge, and the verdict was for the defendants.

His Honor, Judge Wallace, charged the jury "that if the plaintiffs knew, when the bond was given, that Ling was in default and indebted

that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction. * * * There is, therefore, neither allegation nor proof, and what, then, does the case rest upon? It rests merely upon this: That at most there was a concealment by the bankers of the former debt, and of their expectation that, if this new surety was given, it was probable that that debt would be paid off. It rests merely upon nondisclosure or concealment of a probable expectation. And if you were to say that such a concealment would vitiate the suretyship given on that account, your Lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland."

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to them in his pre-existing agency, and yet concealed this fact, and held him out to them as trustworthy either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them;" and, secondly, "that each default of Ling, after the bond was given, in failing to pay over to the company the money collected by him as their agent, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that if, knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them."

He declined to charge the following requests of the plaintiffs: (1) "That, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties. (2) That the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part to do so. (3) That there is no proof whatever that the plaintiffs held out Ling as competent and trustworthy, or in any way imposed upon the sureties, and that in law the railroad company did nothing that would discharge the sureties. (4) That there is no fact for the jury to find but the default and the amount of the default, and there is no law in the case to prevent the recovery by the plaintiff of the amount proven."

The appeal is founded upon the charge, and the refusal to charge, as hereinabove.

The charge of the judge so far as reported, seems to have been directly upon the two grounds of defense relied upon by the defendants and set up in their answer. It was nothing more than a declaration by the judge, that, if the evidence in the case sustained the averments in the answer as to matters therein alleged as a defense, in law the defendants had a good defense. Subject to the modification hereinafter suggested, we think the principles laid down were sound. The law requires good faith in parties contracting with each other; and the high moral principle, that misrepresentation or concealment of a material fact in reference to the matter contracted about, or any device by the one to prevent the other from being fully informed, will vitiate the contract, is found in all textwriters upon the subject of contracts, and is sustained by numerous decisions, not only in this state, but in all the courts where the English law prevails.

This principle applies in its fullest force to contracts on suretyship. Judge Story (1 Eq. Jur. § 324) says: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage, information or surprise taken of the surety by the creditor, will undoubtedly furnish a sufficient ground to invalidate the con-

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tract." See, also, Ad. Eq. *179, where the same doctrine is announced.

The propositions of law, charged by the judge, were in accordance with these principles, except that he went too far in holding, in the second proposition, that if the appellants knew of Ling's default accruing after the execution of his bond, and yet, notwithstanding this, they continued to employ him, condoning his default, and giving no notice to his sureties of his misconduct, that this would discharge the sureties entirely. This, no doubt, was good law, so far as it warranted the discharge of the sureties from the culpable defaults occurring subsequent to the first default, after the execution of the bond; but it was error to hold that the sureties would be entirely discharged thereby, even though there had been fraudulent concealment of the first default. Because, in any event, the first default was a breach of the bond, and against this the fraudulent continuation of the employment of the agent afterwards was no defense. The judge should have limited the discharge, even upon the facts supposed, to the defaults occurring after the first.

We think the judge was in error, too, in refusing to charge to two first requests of the appellants. We have carefully examined the cases referred to by counsel on both sides, and, although there is some conflict in the decisions, we think the weight of the argument is in favor of the position that there must be some positive act of concealment or misrepresentation on the part of the obligee, in cases like this before the court, as to some fact which it was his duty to discharge, before the sureties can be relieved. Silence merely, especially as to facts within the reach of proper inquiry by the sureties, will not be sufficient. The law stands between the parties perfectly impartial, ready to rebuke fraud, concealment, or misrepresentation on the part of either, but carelessness and want of proper vigilance are left to their own fruits. There must be an intent to deceive, not a mere passive omission to state everything within the knowledge of the creditor. The intent is the gist of the fraud, and this should be made to appear. Stafford v. Newsom, 31 N. C. 507; De Colyar on Prin. and Sur. 367; Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231; Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60.

We were at first inclined to think that the presiding judge, in his charge, had laid down the law applicable to such cases in its fullest extent, subject to the modification hereinabove. He required actual concealment or misrepresentation to be found as a fact by the jury before relieving the sureties. This seemed to be all that the plaintiffs could claim. But upon examination of the cases where the question has been discussed, while we do not find any legal adjudication of what will constitute concealment or misrepresentation in such form as to be applied as a test in every case where the question is presented, yet we find several decisions in other states where certain facts have been held not to amount to such concealment. For instance, it has been held as a matter of law that it was no fraud upon the sureties that the principal

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was behind in his accounts at the time he gave his bond of indemnity and no notice given to the sureties, and also that the obligee was not legally bound to notify the sureties of each and every default of the principal. See Guardian of the Stakely Union v. Stratter, 22 L. T. Eng. 84; Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60; Pittsburg, Ft. Wayne & Chicago Railroad Co. v. Shaeffer et al., 59 Pa. 350; Watertown Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196; Taft v. Gifford, 13 Metc. (Mass.) 187.

It is the business of the surety to see for himself that his principal performs the duty which he has guaranteed. The surety is bound to inquire for himself, and cannot complain that the creditor does not notify him of the state of the accounts. Now the principle, as laid down in these cases referred to above, is precisely what the appellant requested the judge to charge in his two first requests, and which, being refused, is made grounds of exception.

The strongest adverse case is the case of Phillips v. Foxall, 3 Moak's Eng. R. 264. But that case, when analyzed, does not conflict with the principles above. That case turned upon a demurrer. The defendant set up the defense that the plaintiff had condoned the default of the servant in not paying over money collected, which the defense directly charged had been embezzled by the servant, and which fact was known to the employer, and, notwithstanding this, he had continued the servant in his employment without notice to the sureties of the embezzlement. The plaintiff demurred to this plea. The court overruled the demurrer and sustained the plea. The court said: "We think that in a continuing guarantee for the honesty of the servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and instead of dismissing the servant, as he may do at once, and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." The ground of the defense in that case was the dishonest act of the servant—embezzlement—known to the plaintiff. The ruling of the court on the demurrer, which admitted the truth of the charge against the servant, was right, and the defense was properly admitted.

But there is a broad distinction between a case of that kind and a case where it simply appears that the agent is behind in his accounts. Knowledge on the part of the employer of dishonesty and corruption in his agent, without disclosure, would amount to a fraudulent concealment; but a falling behind in current accounts by an agent is not always the result of dishonesty. We do not think that simply the failure on the part of the employer to give notice to the sureties that the agent is behind in his accounts at the time he executes the bond, or that he has fallen behind since the execution of the bond, is such a fraudulent concealment of material facts as in itself, without more,

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should discharge the sureties. These facts might properly go to the jury with other facts bearing upon the question of fraudulent concealment, and have such weight as would be proper; but, standing alone, they would not be sufficient to discharge the sureties.

We think the appellant was entitled to the charge requested in the two first requests. The other requests of appellant were properly refused, involving, as they did, questions of fact mostly.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded for a new trial.

MACEY, HENDERSON & CO., Limited, v. HEGER et al.

(Supreme Court of Pennsylvania, 1900. 195 Pa. 125, 45 Atl. 675.)

Argued January 23, 1900. Appeal, No. 381, January Term, 1899, by plaintiff, from order of Common Pleas No. 2, Philadelphia County, June Term, 1899, No. 75, discharging rule for judgment for want of a sufficient affidavit of defense. Before McCOLLUM, MITCHELL, FELL, BROWN, and MESTREZAT, JJ. Affirmed.

Assumpsit upon a bond of indemnity.

The material averments of the affidavit of defense are set forth in the opinion of the Supreme Court.

Error assigned was in discharging rule for judgment for want of a sufficient affidavit of defense.[11]

Mr. Justice FELL. The affidavit of defense filed in this case was clearly sufficient to prevent judgment. The action was on a bond of indemnity conditioned for the faithful performance by one of the defendants, T. A. Heger, of his contract for the excavating, grading and concrete work necessary in the building of a storehouse.

The substance of the material averments of the affidavit is that the defendant was a subcontractor for work to be done by the plaintiff for the United States government, and that at the time of entering into the contract he was told by the president of the plaintiff company, which had the contract for the whole work, that the specifications could not then be shown him; that the president stated to him the amount of excavation and concrete work required by the specifications, and assured him that his statement was correct and would be verified by the specifications; that fully believing the representations made, and relying on them, he signed the agreement and began the work; that upon discovering that the statement made to him was incorrect and untrue, and that a much greater amount of work would be required, he requested a reformation of the contract, and upon the refusal of the plaintiff, he quit work.

The facts averred, if established by proof, would be a complete defense in an action by the plaintiff to recover damages for a breach of

[11] Citations of counsel are omitted.

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the contract by the defendant, and it follows that they are equally effective in an action on a bond given to secure the performance of the contract.

The judgment is affirmed.[12]

HENRY v. DALEY.

(Supreme Court of New York, 1879. 17 Hun, 210.)

Appeal from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The action was brought to recover the amount agreed to be paid for the transfer by the plaintiff's assignor to one Bloomer (for whom the defendant was surety) of a certain milk business in the city of Poughkeepsie. Among other defenses the defendant set up that the plaintiff's assignor induced said Bloomer to enter into the contract by making certain false representations as to the extent of the business, and also alleged that the plaintiff's assignor had made a certain warranty as to the extent of such business, which was false.

GILBERT, J. On the 4th of April, 1878, one Bloomer and the assignor of the plaintiff entered into a mutual contract under seal, whereby the former sold to the latter "a milk route" in Poughkeepsie, with the good will thereof, and certain chattels connected therewith, and guaranteed that on said milk route he had been and was selling 150 quarts of milk per day, and he agreed not to sell or be interested in selling sweet milk in Poughkeepsie while Bloomer remained in business. In consideration thereof Bloomer agreed to purchase said property, and to pay $100 in cash on the 25th of said April, and $100 by a good indorsed note, payable in three months. The defendant on said 4th of April became surety for the faithful performance of Bloomer's covenant. Thereupon the contract was executed by the plaintiff's assignor by turning over to Bloomer the milk route and chattels sold, so far as appears, and he has remained in the enjoyment thereof ever since.

The defendant sets up as a defense certain items which might constitute a set-off in favor of Bloomer, and also that Bloomer was induced to enter into the contract by the fraudulent representation of the plaintiff's assignor that 150 quarts of milk per day were sold on said milk route, and by deceit practiced by said assignor to make him

[12] Accord: Putnam v. Schuyler, 4 Hun (N. Y.) 166 (1875).

As the surety's defense, if based on that of his principal, is strictly limited to the defense available to his principal, an untrue representation would not avail the surety, if made to the principal without knowledge of its falsity. Bryant v. Crosby, 36 Me. 570, 58 Am. Dec. 767 (1853).

The equitable doctrine of misrepresentation, which permits rescission where no scienter is alleged, would, however, lead to a contrary conclusion in the last cited case. See Anson on Contracts (Huffcut's Ed.) pp. 179 to 203. Courts of law have only in a few instances adopted this equitable doctrine. Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (1888).

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believe that said representation was true. The question is whether the defense is available to the defendant. I always supposed, and I am still of opinion, that such a defense is personal to the principal, and that it is not available in behalf of the surety. Comstock v. Ames, *42 N. Y. 357. Fraud does not render the contract void, but it is voidable only at the election of the party defrauded. If he elects to avoid the contract, he can do so only on the condition of returning whatever he has received under it. If he elects not to avoid it, he may sue for his damages occasioned by the fraud. Lindsley v. Ferguson, 49 N. Y. 623. In this case it is not averred that either Bloomer or the defendant has returned or offered to return anything which the former received under the contract, or that Bloomer has made any claim for damages on account of the fraud. The defendant cannot do either. The property received by Bloomer belongs to him, and not to the defendant; nor could the latter maintain an action for the damages occasioned by the fraud, for the reason that he is not the party defrauded. *42 N. Y., supra. The damages are not due to him. Bloomer's damages may be greatly in excess of the defendant's liability. The defendant could be allowed them as a defense or a counter-claim, only upon some principle that would make the recovery of them by him a bar to any future action or counter-claim by Bloomer for such damages. The defendant might thus bar a large claim in favor of Bloomer by canceling a small one against himself. These considerations, I think, show that this defense was properly excluded, and that the presence of Bloomer, as a party, would be necessary in any action to make it available to the defendant. The same principle would be applicable if the defense should be regarded as a counter-claim for damages, occasioned by the breach of the vendor's warranty. Indeed, no counter-claim exists, except it be for damages due to the defendant. Code Civ. Proc. § 501 et seq. The cases when the surety has been permitted to set up as a defense matters personal to his principals are such as show that the contract never had a valid existence, or that the liability created by it has been extinguished in whole or in part. Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Lasher v. Williamson, 55 N. Y. 619; Putnam v. Schuyler, 4 Hun, 166.

The defenses not based on fraud were, I think, causes of action in favor of the plaintiff, which arose independently of the contract. If so, they are not a legal defense in favor of the defendant.

The judgment must be affirmed, with costs.

DYKMAN, J., concurred. BARNARD, P. J., not sitting.

Judgment affirmed, with costs.[18]

[18] Accord: Brown v. Wright, 7 T. B. Mon. (Ky.) 397, 18 Am. Dec. 190 (1828); Walker v. Gilbert, 15 Miss. 456 (1846).

In Hazard v. Irwin, 18 Pick. (Mass.) 95 (1836), the principal rescinded on the ground of fraud. This defense was permitted to the surety. Shaw, C. J., said: "Fraud in the terms of a contract of sale renders it, not absolutely void, but voidable at the election of the party defrauded. The rule is designed for his security and protection. If he is desirous to retain the commodity and

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LADD et al. v. BOARD OF TRUSTEES OF TOWN 41 N., R. 14.

(Supreme Court of Illinois, 1875. 80 Ill. 233.)

Appeal from the Superior Court of Cook County; Hon. Joseph E. Gary, Judge, Presiding.

Mr. Justice SCHOLFIELD delivered the opinion of the court.

Appellants are sued on the bond of Samuel Greene as township treasurer of township 41, in Cook county, upon which they are sureties. It appears, from the record of the board of trustees of that township, that at their regular semi-annual meeting, held at Evanston on the 2d day of October, A. D. 1871, the following order was made: "The term of the treasurer's office having expired, upon motion of Mr. Greenleaf, Samuel Greene was reappointed treasurer for the ensuing two years." The bond in suit is dated October 30, A. D. 1871, is indorsed, "Approved and accepted by E. R. Paul and L. L. Greenleaf, trustees," and filed by the county superintendent on the 9th of November, 1871. On the 14th of October, 1873, Eli A. Gage was elected township treasurer, as the record of the board of trustees shows, "in the place of Samuel Greene, whose term of office had expired."

The breaches claimed are in the failure of Greene to pay over to Gage, as his successor in office, certain moneys in his hands, which he had received and held as treasurer.

The first point made by appellants is that Greene was appointed treasurer in October, 1870, for two years, and gave a bond which, being destroyed by the great fire of Chicago of the 8th and 9th of October, 1871, he was required by the county superintendent to replace; and the bond in suit was executed for that purpose only, and, consequently, binds them for the acts of Greene until the expiration of the two years for which he was appointed in October, 1870, and no further.

We do not consider the point well taken. The office of treasurer was fixed by the school act of 1865 to commence at the semi-annual meeting of the board of trustees in October of that year, and the term was two years. Thus the terms would expire and new terms commence, respectively, in October, 1867, October, 1869, and October, 1871; and so, if Greene was appointed treasurer in October, 1870, it is to be presumed it was for the residue of a term, expiring in October, 1871,

carry the contract into effect, although he has been imposed upon and cheated in the terms of it, he undoubtedly has a right so to do. He may be so situated that although conscious that he has been grossly defrauded, yet so urgent may be his necessity for the immediate use of the article purchased that he would rather submit to the imposition than repudiate the contract. In such case, neither the other contracting party nor a stranger can avoid the contract on that ground. But we think this argument is not warranted by the pleas; but the pleas do state, not perhaps in the most precise and formal manner, but with a certainty sufficient after verdict, that the principal, Penman, did repudiate and rescind this contract."

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and the record of his appointment would seem to be conclusive that, when appointed on the 2d day of October, 1871, it was for the period of two years. Besides this, the bond is in the precise form required by the statute, when a treasurer is appointed for a full term. It does not profess to have been executed as a substitute for a former bond, or to have any retroactive effect.

What Greene may have said as to the purpose of the bond is immaterial. The trustees were invested with authority to appoint the treasurer, and the bond had to be made to and approved by them. If appellants were content to take Greene's word as to the purpose of the bond, rather than go to the trustees and ascertain from them why it was to be executed, they cannot complain that they trusted unwisely. It was their own folly. Nor do we regard it of any consequence what the county superintendent may have said in this respect. The law fixed the term of office of the treasurer, and it gave the power of appointment and removal to the trustees alone, and not to the county superintendent in any event, and his only duty in regard to the treasurer's bond was, after it was approved by the trustees and delivered to him, to carefully examine it, and if found to be in all respects according to law, and the securities good and sufficient, indorse his approval thereon, and file it with the papers of his office, but if in any respect defective to return it for correction. Gross' St. 1869, p. 688, § 15. Had appellants gone, as they should, to the trustees, or examined their records, before signing the bond, they would have been fully advised of the purpose for which it was required. * * *[14]

We see no cause to disturb the judgment, and it will be affirmed.

Judgment affirmed.[15]

PAGE v. KREKEY.

(Court of Appeals of New York, 1893. 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made February 26, 1892, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action upon a guaranty set forth in the opinion, which also states the facts, so far as material.[16]

O'BRIEN, J. The judgment from which this appeal is taken was recovered upon a guaranty, signed by the defendant and sent to the plain-

[14] Only that portion of the opinion is printed that deals with the subject of fraud in relation to suretyship.

[15] Accord: Johnston v. Patterson, 114 Pa. 398, 6 Atl. 746 (1886); Wallace v. Wilder (C. C.) 13 Fed. 707 (1882); Martin v. Campbell, 120 Mass. 126 (1876); Stone v. Compton, 5 Bing. (N. C.) 142 (1838), ante, p. 68; Graves v. Tucker, 10 Smedes & M. (Miss.) 9 (1848); Spencer v. Handley, 5 Scott (N. R.) 546 (1842).

[16] The argument of counsel is omitted.

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tiff, a resident of Vermont, by mail. The plaintiff had business transactions with one Bernard Thinnes prior to the guaranty. The latter was a tanner in Brooklyn, and the plaintiff, a dealer in green calfskins, had shipped to him skins at various times to tan, and, unless he elected to buy them at a certain price, then to return them, so tanned, to the plaintiff, or deliver them according to his order. The following is the instrument upon which the action was brought:

"Brooklyn, N. Y., March 14, 1889.

"Mr. C. S. Page, Hyde Park, Vt.: I am well acquainted with B. A. Thinnes, tanner, of this place. I believe him to be a good tanner, honorable and straightforward in his dealings and attentive to business, and if you will from time to time send hides and skins to him, I hereby guarantee that he will not convert or misappropriate them, but will well and faithfully tan them, and, if he does not buy and pay you for them within the time agreed upon between you, I agree that he shall deliver them at Rose, McAlpine & Co., New York City, N. Y.

"Notice of your acceptance is hereby waived.

"Joseph Krekey,

"P. O. Address, 248 Freeman St."

It was shown at the trial that the defendant was an illiterate man, who could not read nor write, except possibly to sign his name; that he signed the paper at the request of Thinnes when in a state of intoxication, and under the false representation that it was an application for a license under the excise law. The principal part of the instrument was in print, probably prepared by the plaintiff, or under his direction. At all events it was presented to the defendant by Thinnes, the representations as to its character were made by him, and when he procured the defendant's signature he sent it to the plaintiff, who, so far as appears, never met or had any personal transaction with the defendant. The plaintiff's claim against Thinnes, exclusive of interest, was $2,122.79 for skins shipped to him under six written contracts, bearing various dates between May 1, 1889, and July 1, 1889. All of these contracts provided that in case of failure to pay for the goods they should be delivered to the firm of Myers & Gordon. The only question submitted to the jury was whether the defendant, in signing the paper, observed proper care and caution, or was chargeable with negligence. In determining the legal effect of this paper, and the obligation thereby created against the defendant, we must assume that he signed it when intoxicated, that he was unable to read it, that he was ignorant of its contents, and that he fixed his signature to it upon the false representation that it was an application for a license.

There can be no doubt that, as between the parties to this transaction, the instrument was void. It was also invalid in the hands of any person who received it with knowledge or notice of the circumstances under which the defendant's signature was obtained. Sometimes releases, discharges and other instruments are procured by the fraud of a third person without the knowledge or participation in the fraud of

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the party to be benefited, who, nevertheless, will not be permitted to reap the benefit of a fraud, though he was himself innocent. The case of Bedell v. Bedell, 37 Hun, 419, is an example of this class of cases. The decisions in these cases rest upon principles obviously just and reasonable. When the fraudulent act is not imputable to the person claiming the benefit of the instrument, upon the principle of agency, he is generally debarred from enforcing it upon the ground of the fraudulent origin of the paper and the fact that he has lost nothing upon the faith of it. Without examining all the cases cited by the learned counsel for the defendant, it may be assumed that in other jurisdictions the courts have held that in a case like this the instrument could not be enforced any more than if the signature of the defendant had been forged. That is the principle which is invoked in behalf of the defendant to relieve him from all liability, but it has not received the sanction of the courts in this state.

While it has been quite uniformly held here that an instrument procured by fraud, trick or artifice, or executed by a party in such a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction, these facts do not always constitute a defense as against an innocent person, who is himself free from any fraud or negligence, and who has advanced money or property to another upon the credit afforded by an instrument like this. But, even in such a case, the person who has signed the paper is not liable upon it, unless it is found that he failed to observe proper care and caution and was chargeable with negligence in attaching his signature. If he actually signed the paper, though procured to do it by fraud, and is chargeable with negligence, he is liable to an innocent party who acted to his prejudice upon the faith of the instrument. Such cases are not governed by the rules applicable to the bona fide holder of negotiable paper procured by fraud, but by the equitable rule that, where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss. If the defendant is to be held liable in this case, it must be upon the principle that by his misplaced confidence in Thinnes he enabled him to obtain property from the plaintiff, who is an innocent third party. McWilliams v. Mason, 31 N. Y. 294; Western N. Y. L. I. Co. v. Clinton, 66 N. Y. 326; Powers v. Clarke, 127 N. Y. 417, 28 N. E. 402; Casoni v. Jerome, 58 N. Y. 315; Baylies on Sureties & Guarantors, 214; Burge on Suretyship, 218.

If this instrument had been a negotiable promissory note, the defendant's liability to the plaintiff would depend upon the question of negligence, and there does not appear to be any sound reason for a different rule in this case. Chapman v. Rose, 56 N. Y. 137, 15 Am. Rep. 401; Whitney v. Snyder, 2 Lans. 477; National Exchange Bank v. Veneman, 43 Hun, 241; Fenton v. Robinson, 4 Hun, 252.

The general principle of law upon which the case was disposed of at the trial, and upon review at General Term, was, in this respect, favor-

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able enough to the defendant. The guaranty contemplated a contract between the plaintiff and defendant's principal. All the goods sent to Thinnes were in pursuance of contracts in writing. The instrument which the defendant signed guaranteed the performance of these contracts only in case they were drawn in accordance with its terms. It was contemplated that there should be a contract between plaintiff and the defendant's principal, but not a contract that in any respect differed from the terms of the guaranty. After the defendant became surety the terms of the obligation the performance of which he guaranteed were changed by the contract between the plaintiff and the principal. The defendant's undertaking was that, if his principal did not buy the skins and pay for them, he would deliver them to Rose, McAlpine & Co. The contract subsequently executed and to which it applied bound the principal to deliver them to Myers & Gordon, another party, and at another place. The question is whether the contract guaranteed has not been so changed as to discharge the surety. Suppose that the contracts had been drawn and in existence when the defendant signed the paper, then, of course, the legal effect of the guaranty would be that the principal would perform the contracts. But if the plaintiff and the principal subsequently changed them by substituting Myers & Gordon for Rose, McAlpine & Co., then we would have a plain case of a guaranty by the defendant of a contract to deliver, at a certain place, changed by the parties to it by providing for delivery at another and different place. It seems to me that such a change of the obligation, to which the guaranty applied, would discharge the surety. What the defendant, by the paper, said to the plaintiff was that, if you will make a contract with my principal to send him hides and skins to tan, providing that he will tan them, with an option to buy, and, if not, then to deliver to Rose, McAlpine & Co., I will be bound for the faithful performance of that contract, not for the performance of a contract to deliver at another place.

Suppose that the contracts as made provided for sending to defendant's principal different property than hides or skins, or property in addition to them; would the defendant be responsible for default in its performance? It seems to me that where a party, intending to enter into a contract with another, prior to its execution secures from the other a guaranty of the performance of such contemplated contract, in which the terms upon which the surety is to be bound are specified, and the contract, when drawn, does not correspond to the terms of the guaranty, the surety will be discharged from liability for default in the contract as made. In such a case the obligation of the principal is different from that for which the surety became bound. This question seems to have been disposed of in the court below on the ground that the change was not material. But the answer to that is that the defendant's obligation is strictissimi juris, and he is discharged by any alteration of the contract, to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to

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his injury. Paine v. Jones, 76 N. Y. 278; Grant v. Smith, 46 N. Y. 98; National M. Bank v. Conkling, 90 N. Y. 116, 43 Am. Rep. 146; Bangs v. Strong, 7 Hill, 250, 42 Am. Dec. 64; Henderson v. Marvin, 31 Barb. 297. * * *[17]

For these reasons, the judgment should be reversed, and a new trial granted; costs to abide the event. All concur (ANDREWS, C. J., and GRAY, J., on second ground in respect to error in excluding evidence); EARL, J., not voting.

Judgment reversed.[18]

SECTION 3.—LEGALITY—EFFECT OF ILLEGALITY.

DENISON v. GIBSON et al.

(Supreme Court of Michigan, 1872. 24 Mich. 187.)

Appeal in Chancery from Bay Circuit.

This bill was filed by Elizabeth F. Denison against Chauncey W. Gibson, Sanford M. Green, William C. Green, and Elias B. Denison, complainant's husband, to set aside and cancel a mortgage given by her, on her separate property, to secure the payment of several notes which she had signed as surety with the defendants, Green and Denison, and which were given by the latter to defendant Gibson for part of the purchase price of stock of the First National Bank of Bay City, and also to cancel her contract relation on said notes. No defense was made except by defendant Gibson. The case was heard on pleadings and proofs, and the court below granted the relief prayed. The defendant Gibson appealed to this court.

GRAVES, J.[19] * * * On the 10th of January, 1868, the complainant filed this bill to set aside and cancel the before-mentioned mortgage and her contract relation on the several notes she had signed. No defense was interposed except by the defendant Gibson, and, the court below having granted the relief prayed, he appealed to this court.

The complainant founds her equity upon two grounds: First, that in obtaining her accession to the arrangement a private fraud was prac-

[17] Only that portion of the opinion is printed that deals with the subject of suretyship. A portion is here omitted dealing with the exclusion of the defendant's own testimony that he was unable to write and holding that such exclusion was error.

[18] On the second point decided by this case, see Part III, chapter VIII, section 3.

[19] A portion of the statement of facts in the opinion has been omitted, and likewise the concurring opinion of Cooley, J.

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ticed upon her in respect to the actual circumstances and condition of the First National Bank of Bay City, and the real standing, resources and pecuniary ability of W. C. Green & Co.; and, second, that material parts of the arrangement for the disposition of the bank and its official agencies, as made and carried out, were illegal, opposed to public policy, a fraud upon the bank and upon her. In the view taken in this opinion it is unnecessary to examine the first ground, because it is considered that the circumstances warrant the relief sought upon the second.

In the able arguments from the bar on the part of Gibson, it was not only conceded, but affirmed, that the position of complainant in the business was that of a mere surety for Denison and the Greens, and no one attempted to controvert the position that the plan contrived and executed to work a transfer of the bank stock and management, and to pay and secure Gibson, was a clear violation of the letter and spirit of the currency act, and of a nature to be detrimental to the standing and working ability of the bank. * * *

The stipulations, which were carried out, for the continuance of Clark and Gibson as directors after the sale, are seen to be plain violations of the law. The former was not to own, and did not own, any stock, and the latter was not to hold any, and did not hold any, except by way of pledge as security. The plan adopted and executed to work out a payment to Gibson, through the discount by the bank of more than $39,000 of the paper presented by W. C. Green & Co., was a violation of the law. That paper was not bona fide bills of exchange drawn against existing values, nor was it in any just sense commercial or business paper owned by W. C. Green & Co., nor was it understood to be. The transaction was not within the proviso of the twenty-ninth section. But it was in substance and effect a mere colorable operation designed to make Gibson a creditor of the bank through a delusive discount thereat to W. C. Green & Co., and was in contravention of the real meaning and intent of the body of that section. The credit to Gibson at the bank for more than $17,000 upon the bare check of W. C. Green & Co., when the law expressly forbade the creation of any such liability for more than $10,000 at the outside, requires no comment.

When we observe the positions of the parties and the related circumstances, it is impossible to regard the illegalities which occurred as mere irregularities connected with the purchase of the bank and not the subject of complaint by Mrs. Denison. She has peculiar claims upon the wakeful solicitude of a court of equity. She is a married woman seeking to preserve her separate estate from the wrongs and folly of others. She is a surety, and asks to be relieved from her engagements as such, in a case where they were made to enable her promisee to sell and her principals to purchase a banking institution, and where upon the sale the promisee and her principals, without her knowledge, united in illegal arrangements which reached forward and contributed to deprive it of all strength and vigor in the hands of her principals, to make

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it nearly if not quite barren as a means to assist in paying the debt, and to render it subject to be deprived of its franchises at the instance of the official agency at Washington. The subject and object of the treaty, and her situation and the nature of her undertaking, with its liabilities, rights and incidents, closely connected her, in the relation she assumed, with the body of the arrangement, and especially with that part of the plan which turned the mode of payment by her principals into a vital disparagement of the subject they were buying. Being a mere surety in regard to the purchase, she was entitled to look to the bank to be acquired, and the benefits and advantages it could yield in the state in which it was before the trade, as constituting something which, in the hands of her principals, could be subjected and made subservient to her interests, and definitely conducive to her protection. And being aware that all the defendants had knowledge that Denison and the Greens would not have ability to pay except as made able through the worth and productive capacity of the property in treaty, she had the right to imply that Gibson as seller, and her principals as buyers, were not involving her as surety to complete and carry out an agreement containing conditions which were not only illegal, but by their very nature such as must conduce to despoil the bank of its apparent and special value, seriously impair its earning capacity and endanger its existence.

That the objectionable proceedings which have been named crippled and debased the bank, that they exposed it to a forfeiture of its franchises, and much contributed to the final catastrophe which happened in little less than six months after the sale, cannot be doubted, and in my judgment, they afforded the complainant proper ground for relief. Indeed, it may be deduced from settled principles in this country and in England, in accordance with what is distinctly affirmed in the civil law, that the agreement of the surety is not binding where the bargain between the primary parties out of which it springs is contaminated by positive illegalities. Domat says: "If in the principal obligation there is any essential vice which may annul it, as if * * * it is contrary to law, the obligation of the surety is likewise annulled. For no one can take surety for validating engagements that are vicious in themselves." Article 1. And again: "Where the [primary] obligation has for its cause some commerce or some disposition prohibited by law, the obligation of the surety will be without effect as well as that of the principal debtor." Article 4, pt. 1, b. 3, t. 4 (section 5, Cush'g Ed.). See, also, Swift v. Beers, 3 Denio (N. Y.) 70; Dedham Bank v. Chickering, 4 Pick. (Mass.) 314, and cases; Boston Hat Manufactory v. Messinger, 2 Pick. (Mass.) 223, and cases; Levy v. Wise, 15 La. Ann. 38; Kimball v. Newell, 7 Hill (N. Y.) 116. The instances in which the surety will be held, notwithstanding the bare invalidity of the principal undertaking, in consequence of the incapacity of the principal and the like, are noticed in Domat, and also in Kimball v. Newell. But the rule governing these cases has, of course, no application here.

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It is quite true that the principals of Mrs. Denison have not essayed to rescind the arrangement, and have not restored anything to Gibson. But this circumstance can be of no avail against her. Whether her principals were, or believed they were, not in a position in which they could compel revocation, or whether they did or did not desire to recede, is not material. Her rights are not foreclosed by the passiveness of those who were parties to the illegalities. Having been induced to become surety in the purchase of a bank, when her principals and the seller, without her knowledge, adopted terms and conditions which were illegal, greatly injurious to the bank, prejudicial to her interests, and serving to impair her chance of protection and indemnification, she ought not, on applying for relief from her undertaking, to have the doors of the court closed against her upon the objection that the seller and her principals have allowed the matter to stand.

The defendant Gibson can no more rely upon this as an answer to her than a complainant, who seeks the aid of the court for the execution of a contract he has performed, can repel the defense of illegality, asserted by his adversary, by insisting that the allowance of the defense will enable the defendant to retain the consideration. The court will not refuse to relieve the innocent surety because the creditor is unable to extricate himself from the consequences and entanglements of his illegal agreement, out of which the engagements of suretyship arose.

And complainant's equity is not subverted or impaired by the circumstance that one of the parties for whom she became surety was and is her husband, who may, in consequence of that relation, reap some benefit from her success. A mere moral incident of that kind, however likely to occur, can have no legal influence. Her rights are no less than they would be if a separation had been caused by divorce or death.

The rule in these cases for cancellation may be different where the ground of relief is a mere private fraud practiced upon the principal alone, and where no question of absolute illegality or of public policy is involved. But this is not such a case, and that point does not demand examination, and is not considered. Here we have positive illegality, a violation of public policy, and a fraud of a public nature, which was adapted to operate, and did operate, against complainant with all the severity and mischief of a direct and immediate fraud upon her. She seems to have been unaware of these objectionable doings, and was under no duty to watch for them. She was justified in assuming that the other parties were conforming to the law of the land, and were not impairing the property which formed the subject of the purchase, by illegal conditions in the bargain. A passage in Lord Hardwicke's judgment in Chesterfield v. Janssen is noteworthy in this connection: "Particular persons, in contracts, shall not only transact bona fide between themselves, but shall not transact mala fide in respect of other persons who stand in such relation to either as to be affected by the contract or the consequences of it; and as the rest of mankind besides

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the parties contracting are concerned, it is properly said to be governed on public utility." 2 Ves. Sr. 125–156. See, also, Egerton v. Earl Brownlow, 4 House of Lords Cases, 140 to 152, 160 to 164, 173 to 177, 195 to 197, 238 to 246.

The position that the bill is insufficient to permit relief on the ground mentioned is not maintainable. The terms of the bargain, as settled and carried out, are quite fully given, and they show with reasonable clearness that the plan for paying the $61,166.54, as fixed and executed, was not only illegal, but of a nature to cripple the bank and seriously impair its earning capacity and value; and the bill alleges that these proceedings were a fraud on the bank, and through their fraudulent effect upon that were a fraud upon complainant. The case is before us on final hearing, upon pleadings and proofs, and it is neither urged, nor is there ground for urging, that any defendant has been misled. Without enlarging this opinion by repeating what the bill contains, it is sufficient to observe that the allegations will justify the relief sought without departing from the course of the court, or even going so far as the authorities would allow. Hale v. Chandler, 3 Mich. 531; Tong v. Marvin, 15 Mich. 60; Attorney General v. Corporation of Poole, 4 Myl. & C. 17–28; Williams v. Earl of Jersey, 1 Craig & P. 91; Smith v. Kay, 7 House of Lords Cases, 750.

Whether in point of fact the defendants were at the time aware that their proceedings were illegal and fraudulent is not a subject of inquiry, because, admitting they were not, the complainant's equity is just the same.

I think the decree of the circuit court, in consequence of the delay occasioned by the appeal, should be modified by a reasonable enlargement of the time prescribed for delivering to the register the promissory notes mentioned, and that in all other respects it should be affirmed, with costs against the defendant Gibson, and that the case should be remanded for the execution of the decree.

COLES v. STRICK.

(Court of Queen's Bench, 1850. 15 Adol. & El. [N. S.] 2.)

Assumpsit. The declaration stated that, whereas, one William Henry Smith, before and at the time of the making of the promise, etc., was indebted to plaintiff in £200., for work done by plaintiff for Smith on his retainer and at his request, and for money paid, etc., and thereupon, to wit, on, etc., in consideration of the premises, and that plaintiff, at the request of defendant, would write and send to Smith an acknowledgment in writing that he, plaintiff, had no legal claim upon Smith in respect of the said debt, defendant undertook, and promised plaintiff, to be answerable to plaintiff for the due payment thereof to him within twelve calendar months then next ensuing: And the plain-

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tiff further avers that he, confiding, etc., did afterwards, to wit, on, etc., write and send to Smith an acknowledgment in writing that he, plaintiff, had no legal claim upon Smith in respect of the said debt; but plaintiff says that, although twelve calendar months since the time of the writing and sending of the said acknowledgment had elapsed before the commencement of this suit, and although Smith has not paid the said sum of money or any part thereof to plaintiff, of which defendant, at the expiration of the said twelve calendar months, and from thence hitherto continually, had notice, yet, etc.; breach, nonpayment of the £200. or any part thereof.

There were counts for goods sold and delivered, work and materials, money lent, and money paid, and for interest, and on an account stated.

The defendant pleaded non-assumpsit to the whole declaration, except as to £4. and £21. 7s. 8d., which sums he paid into court on the last count. The plaintiff joined issue on the first plea, and took the £25. 7s. 8d. out of court.

The defendant also pleaded to the first count as follows:

Plea 2. That the promise in the first count mentioned, and the aftermentioned request of the said W. H. Smith, were made after the passing of an act, etc. (7 & 8 Vict. c. 96), "to amend the law of insolvency, bankruptcy, and execution," and while that act was in force, to wit, on, etc. That, before and at the time of the making of the promise, Smith was a prisoner in execution upon a judgment theretofore, to wit, on, etc., obtained against him in the court, etc. (Common Pleas), by one Edward Rawson Clark, in an action against the said Smith for the recovery of a debt, and was a trader within the meaning of the statutes relating to bankrupts which, on the day and year last aforesaid (12th February, 1847), were in force, and owed debts amounting to £300. and upwards, and was desirous of petitioning the Court of Bankruptcy for the Bristol district, within which he, Smith, had resided twelve calendar months, for protection from process under the provisions of the said act of Parliament, as a trader within the meaning of the said statutes, owing debts amounting in the whole to less than £300., and, in support of such petition, of falsely representing himself to the last-mentioned court to be a trader within the meaning of the said statutes, owing debts amounting in the whole to less than £300.; all which premises the said Smith at the time when defendant made the said promise, and at the time when Smith requested defendant to make the same as after mentioned, well knew. That he so made the said promise in the first count mentioned, at the request of Smith, then to him in that behalf made. That he so made the said promise, and that Smith so requested him to make the same, each of them with the intent that by the aid of the said acknowledgment in writing Smith might, on so petitioning as aforesaid in support of such his petition, be the better able falsely to represent to the said court that he, Smith, owed debts amounting in the whole to less than £300. That plaintiff, at the time of the making the said promise, knew the said corrupt purpose for which

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the said promise was so made, and with that knowledge accepted the said promise, and assented, for the purpose after mentioned, to write and send to Smith the said acknowledgment in writing, for the purpose of aiding Smith in making such false representations to the last-mentioned court as aforesaid for the purpose so intended by Smith as aforesaid; and so the defendant says that the said promise was and is wholly void. Verification.

Plea 3. As to £161. 18s. 3d., parcel of the sum mentioned in the last count: That the promise next mentioned, and the after-mentioned request of W. H. Smith, were made after the passing of an act, etc. (7 & 8 Vict. c. 96). The plea then stated the imprisonment of Smith in execution, and that he was a trader, etc., exactly as in plea 2, and that he owed debts amounting to £300. and upwards, and, among these, a debt to plaintiff of £161. 18s. 3d., and that he was desirous of petitioning for protection from process, and of falsely representing, etc. (as in plea 2, with averment of knowledge by Smith as in that plea). That thereupon, and before the stating of the account in the last count mentioned, to wit, on, etc., defendant, at the request of Smith then to him, defendant, in that behalf made, promised plaintiff that, if plaintiff would write and send to Smith an acknowledgment in writing that he, plaintiff, had no legal claim upon Smith in respect of the said debt, defendant would be answerable to plaintiff for the due payment thereof to plaintiff within twelve calendar months then next ensuing. Averments, as in plea 2, of the intent with which defendant's promise and the request of Smith were made, and that plaintiff knew the corrupt purpose, etc., and, with that knowledge, accepted the promise, and assented to write and send the acknowledgment to Smith, for the purpose of aiding Smith in making the false representation, etc. That plaintiff afterwards, to wit, on, etc., relying on defendant's said promise, did write and send to Smith the said acknowledgment in writing that he, plaintiff, had no claim upon Smith in respect of the said debt. That the said account, so far as it relates to the said sum of £161. 18s. 3d., was stated after twelve calendar months had elapsed from the time of making the said promise, and when the said promise of £161. 18s. 3d. was due from defendant to plaintiff upon and by virtue of the said promise, and that the same was so stated, so far as relates as aforesaid, of and concerning the last-mentioned sum and no other money whatever. That the said sum of £161. 18s. 3d., parcel as aforesaid, was and is claimed by plaintiff to be due, and sought to be recovered as money found due, on the stating of the said account: and so defendant says that the said promise to pay the last-mentioned sum was and is wholly void. Verification.

Replication to each plea, 2 and 3: De injuria. Issues thereon.

On the trial, before Wightman, J., at the sittings in Middlesex after last Hilary term, it appeared that Smith, being in custody as stated in the pleas, had, in 1846 and 1847, endeavored, without success, to obtain his discharge as a certificated bankrupt. See Wearing v. Smith, 9 Q.

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B. 1024. The defendant had acted as Smith's solicitor, and employed the plaintiff as his agent; and, in the course of the proceedings, £161. 18s. 3d. had become due from Smith to the plaintiff, for his costs. In 1847, Smith then purposing to petition as stated in the pleas, the defendant wrote as follows to the plaintiff:

"Doughty Street, 13th February, 1847.

"My Dear Coles: You are aware that our friend Mr. Smith purposes a fresh application to the court at Bristol for an interim order, putting himself down as a trader under £300. To enable him to do this, you and I must release him pro tem. against any legal claim we have against him; therefore, as he is better known to me than to you, I would take upon myself any responsibility that may attach. If, therefore, you would, with your usual kindness, so far oblige me as to send him a letter to the effect that you have no legal claim on him, I will undertake that your charges are paid, if not before, certainly within twelve months from this time. You will do this at once in case of necessity. I am, etc., Edward Strick.

"Robert Coles, Esq."

The plaintiff then wrote to Smith:

"Dear Sir: I hereby release you from any claim I may have against you up to this time. Yours truly, Robert Coles."

His charges, however, were not paid according to the promise. The plaintiff's case at the trial rested mainly on the defendant's letter of February 13th. A verdict was found for plaintiff on the first issue, and for defendant on the others, with leave to the plaintiff to move that a verdict might be entered for him on these issues as the first, with £161. 18s. 3d. damages, or such sum as the master might find to be due.

Shee, Serjt., now moved accordingly (before Lord CAMPBELL, C. J., and PATTESON, WIGHTMAN, and ERLE, JJ.) [WIGHTMAN, J. The facts were proved as pleaded; you have to contend that they are no defense. The proper motion, if any, seems to be for judgment non obstante veredicto.] Perhaps that is so. The contract was legal, and founded on a consideration; whether an adequate one, or not, the court will not inquire. [Lord CAMPBELL, C. J. There is abundant consideration; the question is on the legality.] The transaction was legal. There was nothing unreasonable or against morality in the arrangement as described. St. 7 & 8 Vict. c. 96, referred to in the pleas, does not differ from St. 5 & 6 Vict. c. 116, in any respect material to this question. The earlier act (section 1) empowered the Court of Bankruptcy to grant protection, by an interim order on petition, to any person being a trader within the bankrupt acts, "but owing debts amounting in the whole to less than £300." St. 7 & 8 Vict. c. 96, § 6, extends this power to the case of any prisoner in execution on a judgment for debt, being such trader, owing, etc. (as before). If the creditors of a trader had actually released him to an amount which brought his debts within £300., he might legally state them to the court at such reduced amount. The whole question is whether nothing short

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of a release will authorize such a representation. The plaintiff here did not release; but his acknowledgment was an effectual bar to his recovering against Smith, the insolvent. [PATTESON, J. Smith was not cleared. If the defendant, as surety, had paid the plaintiff, he might have recovered over against Smith. Lord CAMPBELL, C. J. Does the debt now subsist, as between Smith and the plaintiff, or is it extinguished? If it exists, the court to which the petition went is deceived.] There may be a valid arrangement, though the parties do not go to the expense of a release. [WIGHTMAN, J. I doubt whether this is not in effect a release, as between the plaintiff and Smith. I do not see how, after the acknowledgment given under his hand, the plaintiff could have sued Smith.] Technically, there ought to have been a release under seal; but the transaction here had the same effect. [ERLE, J. If the plaintiff had sued Smith, what would the plea have been? WIGHTMAN, J. According to your argument, he would have pleaded a parol discharge on a new consideration.] That might have been the form. [ERLE, J. Was it actually intended here that Smith should be released? As to judgment non obstante veredicto, which must turn on the words of the plea, it appears by the averments that the promise was made in order to carry a falsehood through.] The transaction is not regular; but nothing so corrupt or illegal appears as to render it void. [Lord CAMPBELL, C. J. We will look into the pleas.]

Cur. adv. vult.

Lord CAMPBELL, C. J., on the following day, delivered the judgment of the court.

There will be no rule in this case. The evidence at the trial was quite sufficient to support the pleas, and to show that there was no bona fide intention of releasing Smith, but only a design to impose upon the commissioner of the Court of Bankruptcy. And the pleas being proved, there is no ground for judgment non obstante veredicto. The averments show an intention in the plaintiff and defendant to defeat the law, and a contrivance to deceive the commissioner and make him believe that Smith owed less than £300., when in fact he owed more.

Rule refused.

WARREN v. CRABTREE.

(Supreme Judicial Court of Maine, 1821. 1 Greenl. 167, 10 Am. Dec. 51.)

Assumpsit by the indorsee against the indorser of a promissory note dated May 17, 1812, signed by Ebenezer Mayo, and made payable to the defendant or order, for $150 in 60 days with grace, and by the defendant indorsed to the plaintiff. The defense was usury.

It appeared that Hugh McLellan, some time in the year 1811, having occasion for a sum of money, applied to the plaintiff for the accommodation; that it was agreed between him and the plaintiff that, if he would procure a good note for $500 payable in 90 days, he, the

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plaintiff, would discount it, at the rate of 1 per cent. per month; that in pursuance of this agreement McLellan did procure a note signed by Ebenezer Mayo, and made payable to the defendant or his order, for $500, in 90 days, which note the defendant indorsed, and McLellan thereupon obtained the money of the plaintiff at a discount of 1 per cent. per month, which was the market value of the note. At this time it was the intention of McLellan to pay the note at its maturity, which he had undertaken to Mayo and Crabtree that he would do. But before that time arrived, finding that he should not be able to pay the whole of the sum as he had intended, he agreed with the plaintiff that he would pay $200 upon the note when it should become due, and for the remaining $300 he would procure another negotiable note from the same parties and indorsed as before, payable in 60 days, which he accordingly did, and paid the plaintiff the same rate of discount as before. This last note, also, he expected to pay at its maturity; but, being unable to do it, he again agreed with the plaintiff, before this note became due, to pay $150 thereon, and for the remaining moiety he was to procure another note, signed and indorsed as before, paying the same discount. Accordingly he procured the note now in suit, and passed it immediately to the plaintiff. McLellan did not indorse either of these notes; and it was proved that the plaintiff paid their fair market value, and that Mayo and Crabtree were secured against their liability on this note, by another note made by McLellan and indorsed by another person to them.

Upon this evidence the judge who presided at the trial of this cause directed a nonsuit; it being agreed by the parties that it should be set aside, if, in the opinion of the court, the law was with the plaintiff upon the evidence reported by the judge. [20]

MELLEN, C. J., delivered the opinion of the court, as follows:

The sum demanded in this action is part of a debt contracted in the year 1811. (Here the Chief Justice recapitulated the facts in the case as before stated.)

In examining the question presented in this case, it does not seem material whether the note in suit be considered as a substitute for a usurious note, and given to secure the balance due on the second note, or, as being usurious in itself, and in its origin, by reason of the verbal agreement to pay 12 per cent. interest.

It is a principle well settled that, if the "original contract is usurious, any subsequent contract to carry it into effect is also usurious." 3 D. & E. 531; Bridge v. Hubbard, 15 Mass. 96, 8 Am. Dec. 86. And if the substituted security be given to the party to the original security, or his representative, it is void, according to the doctrine of Cuthbert v. Haley, 3 D. & E. 390.

The plaintiff opposes the defense on two grounds: (1) Because the plaintiff must be considered as having purchased the notes in the mar-

[20] The arguments of counsel are omitted.

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ket, at a fair discount, and under such circumstances that, according to the case of Churchill v. Suter, the contract cannot be deemed usurious. (2) Because the contract, if usurious, was not made by the defendant; and of course, that he is not entitled, by law, to set up such defense.

With respect to the first objection, when we look at the evidence in this case, we are not able to discover how the notes can be considered as having been purchased in the market by the plaintiff, so as to protect them from the operation of the statute. In cases of such purchase, the note is fairly made without previous concert, or any stipulations relating to interest, and without reference to any one in particular as the intended purchaser. The note, being signed and indorsed, is offered for sale. Its value in the market must depend on the responsibility of the parties to it, the time of payment, and the scarcity of money; and the purchaser takes these particulars into consideration, and makes the purchase at what is supposed a fair discount. But in the present case all was arranged beforehand. The loan was agreed upon, the rate of usurious interest settled, between the plaintiff and McLellan, for whose use the loan was to be made, and the names of the promisor and indorser were known and accepted as good. Surely, if such a mode of doing the business could change the whole transaction into a fair and innocent purchase of the note in the market, the law would be worse than useless, and such an evasion no honor to our courts of justice.

The plaintiff's second point is entitled to more respect; but we apprehend it does not, in reality, possess any more merit or solidity than the former.

In the case of Chadbourn v. Watts, 10 Mass. 121, 6 Am. Dec. 100, the substituted security was given to Lancaster, and afterwards indorsed to Chadbourn, the plaintiff, who had no notice that usury had infected any of the preceding securities which had been given up; and in this respect it differs from the case at bar.

In Cuthbert v. Haley, before cited, Grose, J., expressly states that if the bond, which was the substituted security, had been given to Plank, who was the party to the original security and lender of the money on usurious interest, it would have been void; and the court proceeded on this principle.

In Young v. Wright, 1 Camp. 139, the contract for usury was not made by the defendant, but between third parties; but Lord Ellenborough decided the defense to be good.

According to the decision in the case of Bridge v. Hubbard, 15 Mass. 96, 8 Am. Dec. 86, cited at the bar, it is of no importance that the contract for the usury was made by McLellan with the plaintiff and the notes signed by others, he being no party to them, because it was known by all concerned that the loan was for his exclusive benefit, and the mode of securing the sum was agreed to by the plaintiff. It is true the court were divided in opinion in that case; but the division was upon a question that does not seem to arise in the present case. Two

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of the court there considered the former contract, which all admitted to be usurious, as canceled and extinguished by payment. In the case before us it expressly appears that the last note was given to secure the balance due on the second. But if this distinction did not exist, we might refer to the case of Maddock v. Hammet, 7 D. & E. 184, to show that such substitution of securities does not amount to payment, and also to Davis v. Maynard, 9 Mass. 242, by which it appears that a new and even higher security, given for a debt secured by mortgage, does not discharge the mortgage.

If the note declared on be considered as unconnected with the preceding notes, the result must be the same, because, at the time it was given, there was an express promise on the part of McLellan to pay 12 per cent. interest, and all was executed according to the wishes of the plaintiff, and by a preconcerted arrangement with him for the usury, and for the kind of security. If the principal and interest are secured by distinct notes, or the usury by a parol promise only, and all are executed at the same time, all are void, because such promise to pay interest constituted a part of the contract for the loan, and the statute declares the whole contract void. If such a device could protect the lender from the penalties of the statute, it would always be evaded with impunity.

We are therefore all of opinion that the motion to set aside the nonsuit must be overruled, and that there must be

Judgment for the defendant.

HOOK v. WHITE.

(Supreme Court of Pennsylvania, 1901. 201 Pa. 41, 50 Atl. 290.)

Argued October 21, 1901. Appeal, No. 23, October Term, 1901, by plaintiff, from judgment of Common Pleas, Greene County, June Term, 1897, No. 8, on verdict for defendants in case of Thomas Hook and Uriah Inghram, executors of Thomas Goodwin, deceased, now for use of George Goodwin, against Z. G. White, alias Zadoc G. White, Wm. Blair, alias William Blair, and Hicey S. Kent, executors of Mordecai Kent, deceased. Before McCOLLUM, C. J., and MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ. Affirmed.

Issue to determine the validity of a judgment entered on a judgment note. Before Crawford, P. J.

At the trial the evidence for the defendants tended to show that the note in controversy was dated October 20, 1882, calling for payment of $848, and that it was given by Z. G. White to Thomas Goodwin, a relative, immediately before White made an assignment for creditors; that there was no consideration for the note; that it was given to defeat the creditors of White, and that the other parties to the note, beside

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White, knew nothing of the fraud, and had signed the note as sureties, believing it to be a bona fide transaction.

Verdict and judgment for defendant.

Errors assigned were various rulings on evidence and instructions.

PER CURIAM. The plaintiff appealed to this court and filed twenty-five assignments of error. An inspection of the assignments failed to convince the court of substantial error in either of them. The charge of the court to the jury was impartial, and nothing appears in it which can justly be construed as depriving the plaintiff of any right or privilege he was fairly entitled to. The testimony was against his contention and was so regarded by the jury. The verdict was for the defendant and the judgment was properly entered thereon. We therefore dismiss all of the assignments.

Judgment affirmed.

SWIFT et al. v. BEERS.

(Supreme Court of New York, 1846. 3 Denio, 70.)

Assumpsit, tried at the New York Circuit in February, 1844, before Kent, late Chief Judge. The plaintiffs gave in evidence a promissory note, with a guaranty written under it, signed by the defendant, in the following words:

"New York, 30th June, 1841.

"Sixty days after date the North American Trust & Banking Co. promise to pay to the order of Messrs. Swift & Co. thirty-seven hundred dollars, for value received, with interest, having deposited with them as collateral security seven bonds of this company, secured under the Yates trust—three for one thousand dollars" (giving the amounts and numbers of the bonds). Thomas G. Talmage, Pres't.

"For value received, I guarantee the payment of the above note at the time mentioned. J. D. Beers."

It was admitted that the North American Trust & Banking Company was a banking association, organized under the general banking law.

The defendant's counsel moved for a nonsuit, insisting that the note and guaranty were illegal and void; and the circuit judge being of that opinion, directed a nonsuit to be entered.[21]

BRONSON, C. J. We have no doubt about this case. The note is directly within the terms of the prohibition of the act of 1840; and we do not doubt but that it was equally within the intention of the Legislature. That act has no reference to the circulation of such notes as money, but was designed to prohibit them altogether for any purpose.

The guaranty partakes of the character of the principal contract. It

[21] The arguments of counsel have been omitted.

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was intended to reinforce and secure it, and is equally illegal. The circuit judge was right in nonsuiting the plaintiffs.

New trial denied.[22]

MOUND v. BARKER.

(Supreme Court of Vermont, 1899. 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767.)

Debt on a bond. Special plea and notice. Trial by Court, at the March Term, 1898, Rutland County; Start, J., presiding. Pro forma judgment for the defendant to recover his costs. The plaintiff excepted.

The defendant offered to show by parol evidence that at the time the lease and bond were executed the plaintiff and the lessees understood and expected that intoxicating liquors would be sold in the hotel leased, in violation of law, by the lessees, and that such liquors were sold therein with the knowledge of the plaintiff. The plaintiff objected to this evidence as contradicting and varying the written lease. The objection was overruled and the evidence received, and the plaintiff excepted.[23] * * *

ROWELL, J. When an agreement, innocent in itself, is designed by one of the parties to further a purpose forbidden by the law or opposed to its policy, courts will not enforce it in favor of such party, nor in favor of the other party if he is implicated in such design. Thus, when property is leased with knowledge on the part of the lessor that the lessee intends to use it for an illegal or an immoral purpose, and does so use it, the rent therefor cannot be recovered. Sherman v. Wilder, 106 Mass. 537; Riley v. Jordan, 122 Mass. 231; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; 2 Taylor, Land. & Ten. (8th Ed.) § 521; Jennings v. Throgmorton, Ry. & M. 251, 21 E. C. L. 744; Smith v. White, L. R. 1 Eq. Cas. 625.

Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687, is not opposed to this, for there the liquors were legitimately used in the plaintiff's drug business, though occasionally sold in violation of law, and no illegal design entered into the making of the policy.

The bond in suit was given by the defendant as surety for the lessees of a hotel, conditioned for the payment by them of the rent reserved, and was executed at the same time as the lease. The lease was innocent, in itself; but, at the time of its execution and delivery, both the plaintiff, who is the lessor, and the lessees, understood and expected that the hotel would be used, not only for the entertainment of guests, but that intoxicating liquor would be sold therein in violation of law; and it was so sold, to the knowledge of

[22] Accord: Board of Education v. Thompson, 33 Ohio St. 321 (1877); Miller v. Gaskins, Smedes & M. Ch. (Miss.) 524 (1843).

[23] Arguments of counsel are omitted.

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the plaintiff. Therefore, if this suit was upon the lease itself, it could not be maintained. It can be maintained no better on the bond; for, when the foundation fails, all goes to the ground. Riley v. Jordan, 122 Mass. 231.

Judgment affirmed.

SECTION 4.—THE EFFECT OF DURESS

HUSCOMBE v. STANDING.

(Court of King's Bench, Trinity Term, 1608. Cro. Jac. 187.)

Debt upon an obligation of £40., conditioned that Richard Street should pay £20. on such a day, etc. The defendant pleads that the said Street was imprisoned by one Eveley, steward of the Stannaries, and the plaintiff, of covin with him, and without any reasonable cause, detained the said Street in prison, against law, and to the great peril of his life, until the said Street should pay to the plaintiff £24., or become bound with a surety for the payment thereof; whereupon, to enlarge the said Street, and to avoid danger of his life, he, and the defendant as his surety, entered into that bond.

It was thereupon demurred, and without argument adjudged for the plaintiff, that it was not any plea for the surety, although it had been a good plea for the said Street; for none shall avoid his own bond for the imprisonment or danger of any other than of himself only, and although the bond be avoidable as to the one, yet it is good quoad the other. Wherefore it was adjudged for the plaintiff. Vide 39 Hen. VI, pl. 51; 7 Edw. IV, pl. 12; 21 Edw. IV, pl. 13.

TOLES v. ADEE et al

(Court of Appeals of New York, 1881. 84 N. Y. 222.)

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, in favor of plaintiff, entered upon an order made November 26, 1879, denying a motion for a new trial and directing judgment on a verdict.

This action was brought upon an undertaking executed by Stephen B. Adee, defendants' testator, for bail.

The material facts are stated in the opinion.

ANDREWS, J. The order of arrest issued in the action of Sarah L. Adee (now Sarah L. Toles), against her former husband, Augustus W. Adee, was in the form prescribed by section 183 of the Code of Procedure, and required the sheriff to arrest the defendant and hold

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him to bail in the sum of $1,000. The sheriff arrested the defendant, and at the time of the arrest delivered to him a copy of the order of arrest and of the affidavit upon which it was granted. The sheriff, after the arrest had been made, went with the defendant to the house of his father, Stephen B. Adee, upon the defendant's suggestion that he would procure his father and some other person to execute the requisite undertaking for his release on bail. It was there proposed to the sheriff that he should accept an undertaking executed by the father alone. The sheriff declined to do this, but finally, upon the urgent solicitation of the defendant, agreed that if the defendant's father would execute an undertaking in the sum of $2,000, he would take it to the plaintiff's attorneys, and if they approved and accepted it, the defendant should be discharged from the arrest, the defendant on his part agreeing that if the plaintiff's attorneys should decline to accept the undertaking, then, on being notified of the fact by the sheriff, he would cause a new undertaking to be executed with two sureties, as required by the order, and that meanwhile he should remain in the custody of his father. An undertaking was thereupon executed by Stephen B. Adee, and delivered to the sheriff, who, on receiving it, discharged the defendant from actual custody. The plaintiff's attorneys accepted the undertaking, and, judgment having been obtained in the action in favor of the plaintiff, this action is brought upon the undertaking against the executors of Stephen B. Adee, for a breach of the condition that Augustus W. Adee should hold himself amenable to the process of the court during the pendency of the action, and to such as might issue to enforce the judgment therein.

The undertaking was not in conformity with the statute. The statute prescribes that the undertaking of bail shall be executed by two or more bail. Code, § 187. Nor, did the undertaking comply with the order of arrest. The order required the sheriff to take bail in the sum of $1,000, whereas the undertaking is in double that sum. It is insisted by the defendants that the undertaking is void colore officii within the statute, which enacts that "no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed, shall be void." 2 Rev. St. p. 286, § 59.

Section 183 of the Code requires that the order of arrest shall specify the sum for which the defendant shall be held to bail. The amount of bail is to be fixed by the judge granting the order. The plain object of this requirement of the statute is to prevent the exaction of unreasonable or oppressive bail, and to leave nothing to the discretion of the officer executing the process. The sum mentioned in the order limits the power of the officer; and if he exacts an undertaking for a greater sum the undertaking is clearly within the statute and void. We have had occasion recently, in the case of Cook v. Freudenthal, 80 N. Y. 205, to pass upon the validity of an undertaking taken by a

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sheriff from a defendant arrested in an action for the claim and delivery of personal property, which contained a provision beyond what was required by the statute; and we held that the bond was for that reason void and could not be enforced at the suit of the plaintiff in the action, although the sheriff appeared to have acted in good faith. Further reflection has confirmed the opinion we then entertained, that public policy requires that officers armed with bailable process for the arrest of defendants should, in taking bonds or other securities for their enlargement, be held to a strict compliance with statutory requirements, neither accepting less nor demanding more than the law prescribes.

Taking bail in personal actions was made compulsory upon sheriffs by St. 23 Hen. VII, c. 8; and this privilege was made more definite and secure by subsequent enactments. The statute of Henry VII related to bail on mesne process only. The right of the sheriff to take bail for the appearance of defendants to answer a writ or process is said, in Dive v. Maningham, 1 Plowden, 67, to have existed before the statute at common law, although this is denied in Beawfage's Case, 10 Co. 426. The statute required sheriffs to let to bail prisoners arrested in personal actions, upon their giving reasonable surety to keep their days, etc., and prescribed the form of the bond, and that it should be on condition that the prisoner appear at the day contained in the writ, etc., and in such place as the writ requires; and then followed the provision that if any sheriffs take any obligation in other form, by color of their offices, it should be void. This was the original of the statutory enactments found in this and most of the states prohibiting and making void bonds taken colore officii. But our statute, as was said by Cowen, J., in Webber's Ex'rs v. Blunt, 19 Wend. 191, 32 Am. Dec. 445, is much broader than the statute of 23 Henry VII. The bail required to be taken by that statute was what was known under the common-law practice as bail to the sheriff or bail below, and the bonds or obligations referred to were those taken in the first instance for the appearance of the prisoner arrested to answer the writ. But our statute applies to every bond, obligation or security taken by a sheriff or other officer, by color of his office, contrary to his duty.

Under our practice the undertaking to be given by a defendant in a civil action to be released from arrest stands in the place both of bail to the sheriff and bail to the action, or special bail, under the former system. The sheriff, in taking an undertaking on letting to bail, acts both in the interest of himself and of the plaintiff. If the bail fail to justify on demand, he stands liable as bail, and has a remedy over against the bail, unless other bail be given or justify. Code, §§ 201, 203. The statute of Henry VII was strictly construed by the English courts; and securities or agreements taken by sheriffs, not in strict conformity with its provisions, were held to be void. Scryven v. Dyther, Cro. Eliz. 672; Rogers v. Reeves, 1 Term R. 418; Fuller v. Prest, 7 Term R. 110. These decisions have been followed in analogous

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cases in our courts. Sullivan v. Alexander, 19 Johns. 233; Bank of Buffalo v. Boughton, 21 Wend. 57; Barnard v. Viele, 21 Wend. 88; People v. Meighan, 1 Hill, 298. The fact that under our practice the bail taken by the sheriff, on discharging a prisoner from arrest, stands in some sense both as bail to the sheriff and as bail to the action, does not, we think, at all affect the application of the statute making void obligations taken colore officii, when the undertaking contains conditions not prescribed by law; nor is it, as we conceive, in the power of the plaintiff afterward to adopt the act of the sheriff and thereby avoid the effect of the illegality. Such a principle, if admitted, would defeat the purpose of the statute. The statute, like the statute of Henry VII, is specially designed to prevent extortion and oppression by officers of prisoners in their custody. The law prescribes the nature of the undertaking and the duty of the sheriff. If the officer takes an illegal security, he is liable to the plaintiff in a proper action; but the plaintiff cannot be permitted to elect to enforce an undertaking illegally taken, when it is for his interest to do so. The statute does not admit of such a construction. The illegal security is wholly void, and can be enforced neither by the sheriff nor by the plaintiff.

It is, we think, no answer to the defense based upon the statute that the illegal security was taken at the instance of the defendant. The security is not good or bad, depending on the circumstance whether it was voluntarily and willingly given, or was extorted by actual duress and oppression. The law defines the condition of the undertaking that the duty of the officer and the right of the party in custody may be plainly understood, and that nothing be left to conjecture or in uncertainty. Courts justly regard with great jealousy all departure by officers holding prisoners under arrest from the strict line of duty. The undertaking in this case bound the surety in double the sum authorized by the order of arrest, and if the undertaking is to be regarded as taken by the sheriff in his official character and in the exercise of his official authority, it must, both upon principle and authority, be held to be void.

But we are inclined to the opinion that the undertaking in question may, in view of the circumstances under which it was made, be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff, under the claim or in the exercise of official authority. It is said by Blackstone (1 Bl. Com. 137) that if a man be lawfully arrested, and either to procure his discharge or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. This principle of the common law has been applied in several cases, in actions upon agreements claimed to be void under the statute of Henry VII; †

† This is evidently a misprint for Henry VI. By the Statute 23 Hen. VI, c. 10, it was provided:

"And that no sheriff * * * shall take or cause to be taken or make any obligation for any cause aforesaid or by colour of their office, but only to

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and it has been held that, where the agreement to discharge a party from arrest was between the parties to the action, it could be enforced by the plaintiff, although it did not conform to the statute. It is competent for the parties, independently of the statute, to agree upon the terms and conditions upon which the discharge shall be had. In Milward v. Clerk, Cro. Eliz. 190, the defendant having been arrested at the plaintiff's suit, in consideration that he should be permitted to go at large, and that the plaintiff would give his warrant to the bailiff, to suffer him to go at large, promised the plaintiff to appear at the day of the return of the process, or pay him ten pounds. In an action upon this promise the defendant pleaded the statute of 23 Henry VII; but the court said: "It is a good assumpsit, being made to the party who had authority to dispense with the appearance; but if the promise had been made to the sheriff, or to any one to his use, it had been within the equity of the statute." In Hall v. Carter, 2 Mod. 304, the action was upon a bond executed by the defendant to the plaintiff, conditioned that if a third person (who had been arrested at the suit of the plaintiff) should give security for the payment of the plaintiff's debt, or should render his body to prison at the return of the writ, the obligation should be void. The defendant pleaded the statute, and the plaintiff demurred. The court sustained the demurrer, and gave judgment for the plaintiff, saying: "There is no law that makes the agreement of the parties void; and if the bond was not taken by such agreement, it might have been traversed." The same principle was recognized and applied in Winter v. Kinney, 1 N. Y. 365. The court reversed the judgment below, on the ground that the question should have been submitted to the jury whether the agreement under which the plaintiff paid the money, which he sought to recover back, was made with the sheriff or with the party at whose suit he was arrested; the court saying the party may make such agreement or take such security as he pleases, on discharging his debtor from arrest. See, also, Harp v. Osgood, 2 Hill, 216. The evidence shows that the sheriff declined at first to take the undertaking in question, doubting his authority to do so. He did not take it in the exercise of his official authority. He simply, as the transaction is proved, consented, at the solicitation of Adee, to act as the intermediary to ascertain whether the plaintiff's attorneys would accept the undertaking and discharge him from arrest. When the plaintiff's attorneys consented to the proposition and accepted the undertaking, it became operative and bind-

themselves, of any person, * * * but by the name of their office and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill or warrant, and in such places as the said writs, bills or warrants shall require. And if any of the said sheriffs * * * take any obligation in other form by color of their offices, that it shall be void."

In Beawfage's Case, 10 Co. 99 (1613), the above statute was construed to allow the sheriff having a fi. fa. to take a bond to pay money into court.

On the point of the rejection of the void surplusage of a bond, vide Haberstro v. Bedford, 118 N. Y. 187, 23 N. E. 459 (1890); Board of Education v. Grant, 107 Mich. 151, 64 N. W. 1050 (1895).

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ing, not as a statutory obligation, but as a common-law agreement between the parties, for a breach of which an action would lie, as upon any other assumpsit.

The remaining question which we deem necessary to consider is whether there was evidence tending to establish the defense that the plaintiff, by her laches, had discharged the surety or his estate from liability. * * *††

The judgment should be reversed and a new trial granted, costs to abide event. All concur.

Judgment reversed.

SECTION 5.—CONDITIONS PRECEDENT

BONSER v. COX.

(Rolls Court, 1841. 4 Beav. 379, 49 Eng. R. 385.)

This cause came on upon exception to the master's report, and related to claims on the estate of Mr. John Cox, deceased, for the administration of whose estate this suit had been instituted.

It appeared that Richard Cox (the brother of the testator, John Cox) carried on the business of a banker at Oxford, in partnership with Messrs. Morrell, under the firm of Cox & Morrell, and he was also engaged in a colliery business in the Forest of Dean, in partnership with D. Davies, under the firm of Cox & Davies.

Messrs. Cox and Morrell had made considerable advances to Messrs. Cox and Davies, and, Richard Cox having applied to his partners for a further advance, it was agreed that they should advance a further sum upon his brother John Cox becoming security for the repayment of £3,000. John Cox agreed, as surety for Richard Cox, to execute a joint and several bond to James and John Morrell for the sum of £3,000., upon having a counter-bond for the like sum from Messrs. Cox and Davies to indemnify him.

A joint and several bond, intended to be executed by Richard Cox and John Cox, was prepared, and was carried by a clerk to John Cox for his execution, and who accordingly executed it. The same clerk afterwards went to the house of Richard Cox to obtain his execution; but he, being from home, did not then execute it, and the bond, having been mislaid, was never, in fact, executed by Richard Cox.

†† The remainder of the opinion, which deals with the question of laches, holding that the failure of the creditor to institute proceedings when requested by the surety raised a question which should have been submitted to the jury, has been omitted.

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The counter-bond was, however, given by Richard Cox and Davies to John Cox, and the further advances were made by the bankers to Messrs. Cox and Davies. Some time after Richard Cox ceased to be a partner in the bank.

In this suit Messrs. Morrell claimed before the master the sum of £3,000. and interest, as due upon the bond, from the estate of John Cox. The claim was resisted, on the ground that John Cox was a mere surety, and that the bankers, having neglected to obtain a bond from the principal debtor, had released the surety.

The claim was disallowed by the master, and Messrs. Morrell took exceptions to the master's report, which now came on for argument.[24]

The MASTER OF THE ROLLS (Lord LANGDALE). I think that it cannot, upon any principles on which this court acts, be doubted that the surety has an interest, and a most material interest, in the rights and remedies which the creditor has against the principal debtor. He is not to be held bound where the situation of circumstances, in respect to the rights and the remedies which the creditor has against the principal debtor, are different from that which was contemplated by himself and all other parties. I do not think that it is material to inquire in what way the surety contemplated benefit or protection to himself, by stipulating that a particular remedy should be held by the creditor against the principal debtor. A man may reasonably say, I will be surety to you for payment of such a sum, provided you have it secured by the bond of the principal debtor, but I will not be surety upon any other terms. The surety in this case has a right to say, "The arrangement was that Mr. Richard Cox, as well as myself, should be held bound by bond to the creditor. That arrangement never was carried into effect." The circumstance of Mr. Richard Cox being held by bond to the surety does not appear to be material in this case.

I think that this exception cannot be sustained; that the master is right, because the surety had not that which he contemplated, and that which was a material portion of the contract stipulated for by him at the time when he entered into this obligation. In the contract as existing between the principal debtor and the creditor, there is a departure from that which the surety stipulated for, and in a matter in which, I conceive, the surety had a most material interest. This exception must therefore be overruled.[25] * * *

[24] The arguments of counsel are omitted.

[25] The opinion of the Master of the Rolls has been abbreviated. This decision was affirmed by Lord Cottenham, June 25, 1841.

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BUTLER v. UNITED STATES.

(Supreme Court of the United States, 1874. 21 Wall. 272, 22 L. Ed. 614.)

Error to the Circuit Court for the Eastern District of Tennessee.

Debt on a joint and several internal revenue bond, executed by Emory, as principal, and by Butler, Sawyer, and Choppin as sureties; the bond on oyer appearing to be in the sum of $15,000.

Butler pleaded that, at the time he signed and affixed his seal to the bond, it was a mere printed form, with blank spaces for the names, dates, and amounts to be inserted therein; that the blanks were not filled, and there was no signature thereto, except Emory's; that Emory promised, if Butler would sign the bond, he, Emory, would fill up the blanks with the sum of $4,000, and would procure two additional sureties in the District of Columbia, each of whom was to be worth $5,000; that he, Butler, signed the bond and delivered it to Emory with the understanding and agreement that the bond was otherwise not to be binding on him, Butler, nor delivered to the United States, or to any of its agents or officers, but was to be returned to him; that Emory did not so fill up the bond, but, on the contrary, falsely and fraudulently filled it up with the sum of $15,000, and with the names of Sawyer and Choppin, neither of whom resided in the District of Columbia, and neither of whom was worth $5,000, but, on the contrary, both of whom were wholly insolvent and worthless; that Emory accordingly obtained the signature of him, Butler, by false and fraudulent representations; that the bond was therefore not the bond of him, Butler, when made, and that he had never afterward ratified or acknowledged its validity.

The Circuit Court, relying on Dair v. United States, 16 Wall. 1, 21 L. Ed. 491, ruled that this was no defense to the action. The defendant excepted and brought this writ of error.

In the case of Dair v. United States, just mentioned, two persons, as sureties, signed a bond to the government at the instance of a third person, who had signed it as principal, the two signing as sureties doing so upon the condition that the instrument was not to be delivered to the government until it should have been executed by a third person named as surety, and then placing it in the hands of the person who had signed it as principal, who without the performance of the condition, and without the consent of the two persons signing as sureties, delivered the bond to the government;[26] the bond being regular on its face, and the government having had no notice of the condition, but where, on suit by the United States, the parties who had signed as sureties were held by this court bound.[27]

[26] If, however, the principal never delivers the bond, it cannot take effect. Crawford v. Foster, 6 Ga. 202, 50 Am. Dec. 327 (1849).

[27] The arguments of counsel are omitted.

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The CHIEF JUSTICE delivered the opinion of the court.

We cannot distinguish this case in principle from Dair v. United States. The printed form, with its blank spaces, was signed by Butler and delivered to Emory, with authority to fill the blanks and perfect the instrument as a bond to secure his faithful service in the office of collector of internal revenue. He was also authorized to present it when perfected to the proper officer of the government for approval and acceptance. If accepted, it was expected that he would at once be permitted to enter upon the performance of the duties of the office to which it referred.

It is true that, according to the plea, this authority was accompanied by certain private understandings between the parties intended to limit its operations, but it was apparently unqualified. Every blank space in the form was open. To all appearances any sum that should be required by the government might be designated as the penalty, and the names of any person signing as co-sureties might be inserted in the space left for that purpose. It was easy to have limited this authority by filling the blanks, and the filling of any one was a limitation to that extent. By inserting in the appropriate places the amount of the penalty, or the names of the sureties, or their residences, Butler could have taken away from Emory the power to bind him otherwise than as thus specified. This, however, he did not do. Instead, he relied upon the good faith of Emory, and clothed him with apparent power to fill all the blanks in the paper signed in such appropriate manner as might be necessary to convert it into a bond that would be accepted by the government as security for the performance of his contemplated official duties. It is not pretended that the acts of Emory are beyond the scope of his apparent authority. The bond was accepted in the belief that it had been properly executed. There is no claim that the officer who accepted it had any notice of the private agreements. He acted in good faith, and the question now is, which of two innocent parties shall suffer. The doctrine of Dair's Case is that it must be Butler, because he confided in Emory and the government did not. He is in law and equity estopped by his acts from claiming, as against the government, the benefit of his private instructions to his agent.

Judgment affirmed.†

† Accord: Stoner v. Millikin, 85 Ill. 218 (1877); Selser v. Brock, 3 Ohio St. 302 (1854); Bigelow v. Comegys, 5 Ohio St. 256 (1855); York County, etc., Co. v. Brooks, 51 Me. 506 (1863); Dair v. U. S., 16 Wall. 1, 21 L. Ed. 491 (1872).

See, also, Wiley v. Moor, 17 S. & R. (Pa.) 438 (1828).

In Russell v. Freer, 56 N. Y. 67 (1874), the bond, at the time of execution by the surety, contained in the body of it another name; but this name was erased before delivery to the obligee. It was held that the sureties, who had signed upon the condition that this other should sign, had no defense.

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GWYN v. PATTERSON.

(Supreme Court of North Carolina, 1875. 72 N. C. 189.)

SETTLE, J.[28] The bond which is the subject of this action came to the hands of the plaintiff's testator, perfect in form, with nothing about it to excite inquiry and put the obligee on guard. He received it and advanced his money thereon, and it is only when suit is brought for the collection thereof, several years thereafter, that we hear anything of a private understanding between Minter, the principal obligor, and Patterson, his surety, the present defendant, that another surety should also sign the bond before delivery. Concede that such was the understanding between Minter and Patterson, what is it worth, when we consider the fact that Johnson, the plaintiff's testator, when he parted with his money, knew nothing about the conversation and understanding between Minter and Patterson?

Conditions imposed by a party to a contract, to be effectual against the other party, who has been induced by the contract to alter his condition to his prejudice, must have been in some way brought to his notice. In Townsend v. Moss, 58 N. C. 145, with a similar state of facts to the case at bar, it was said by the Chief Justice, arguendo: "If loss follows from this breach of confidence, it should fall on the party who reposed the confidence, rather than on an innocent third person." Or, in other words, where one of two innocent persons must suffer by the acts of a third, he who had enabled such third person to occasion the loss must sustain it. In State v. Peck, 53 Me. 284, Burrows, J., has collected and distinguished the cases on this subject in so satisfactory a manner as to render a further discussion of it unnecessary. We will only quote the syllabus in Millett v. Parker, 2 Metc. (Ky.) 608, which is directly in point: "One who signs a covenant as surety upon the condition and agreement, between him and his principal, that it is not to be binding upon him or delivered to the covenantor, unless another person should also sign it as surety, is bound thereby, although the principal to whom he intrusted it delivered it to the covenantor, without a compliance with such condition, of which and its breach the latter has had no notice."

PER CURIAM. Judgment below affirmed.[29]

[28] The statement of facts is omitted.

[29] Accord: Mowbray v. State, 88 Ind. 324 (1882).

Contra: People v. Bostwick, 32 N. Y. 445 (1865). See, however, Russell v. Freer, 56 N. Y. 67 (1874), where the court, in referring to the last cited case, says: "Assuming that that case was well decided." Whether these two cases are distinguishable is doubtful. Ayres v. Millroy, 53 Mo. 516, 14 Am. Rep. 465 (1873).

If the delivery of the bond (being a completed instrument) is made by the surety obligor to the creditor obligee upon a parol condition precedent, such condition cannot be shown. According to the common-law doctrine of contract by deed, to give effect to this condition would be to defeat the unequivocal act of delivery. Garvey v. Marks, 134 Mo. 1, 34 S. W. 1108, 38 S. W. 79 (1896); Neely v. Lewis, 10 Ill. 31 (1848). See Rolle's Abr. Faits, (o), 1, 2.

But, if an incomplete instrument is given by the obligor surety to an agent

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MORTEN et al. v. MARSHALL.

(Court of Exchequer, 1863. 2 Hurl. & C. 305.)

Declaration: For that heretofore, to wit, on the 7th November, 1861, the plaintiffs, as and being executors of the last will and testament of J. Lovatt, deceased, in the Court of Exchequer of Pleas at Westminster, by the judgment of the said court in an action therein, recovered against one W. Turnbull £185. 1s. 6d., together with £4. for his costs in that behalf; and thereupon afterwards, to wit, on the 25th of August, 1862, in consideration that the plaintiffs, at the request of the defendant, would stay execution upon the said judgment in the said action against the said W. Turnbull until the 6th of October then next, the defendant promised the plaintiffs that the amount of £90. 1s. 6d., being the balance of debt then due to the plaintiffs and recovered by them under the said judgment, together with the costs of the said action, should be paid to the plaintiffs on or before the said 6th October, and that if not paid to the plaintiffs by the said W. Turnbull that the defendant would pay the same to the plaintiffs.

Averments: That all things have been done and happened, and all times have elapsed necessary to entitle the plaintiffs to maintain this action; yet neither the said W. Turnbull nor the defendant have or hath paid the said sum of £90. 1s. 6d. and costs as aforesaid, or any part thereof.

Plea: That the said promise was a promise and undertaking in writing made by the defendant to the tenor following:

"Morten and Another v. Turnbull.

"In consideration of the execution being stayed in this matter until the 6th day of October next, I hereby undertake that the amount of

(principal or another), the instrument must be completed according to its terms; otherwise the obligee, receiving it in an apparently incomplete state, receives it with notice. Fales v. Filley, 2 Mo. App. 345 (1876); Pawling v. United States, 4 Cranch, 219, 2 L. Ed. 601 (1808), delivered as escrow to principal.

The use of the word "sureties," where only one surety had signed, was held not to amount to notice that another should sign in Brown v. Probate Judge, 42 Mich. 501, 4 N. W. 195 (1880).

In Mullen v. Morris, 43 Neb. 596, 62 N. W. 74 (1895) the bond was joint and several, and contained in the body of it two names of obligors who had not signed when the defendant obligor delivered the bond to the obligee. Held, that there was a valid delivery. See, also, to the same effect, Towns v. Kellett, 11 Ga. 286 (1852); Blume v. Bowman, 24 N. C. 338 (1842).

Where the creditor or promisee has notice of the condition precedent, he must ascertain whether it has occurred. This rule has no application where the notice is of an immaterial fact, as in the case of delivery of a specialty to the obligee upon a parol condition precedent. Fertig v. Bucher, 3 Pa. 308 (1846); Leaf v. Gibbs, 4 C. & P. 466 (1830).

See Ellesmere Brewery Co. v. Cooper, L. R. 1 Q. B. Div. 75 (1896), where one surety who signed, but not in accordance with the amount of liability mentioned in the bond as assumed by him, thereby rendered the bond unenforceable against all the sureties who had signed.

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£90. 1s. 6d., the balance of debt now due to the plaintiffs, together with costs, shall be paid to the plaintiffs on or before the said 6th day of October; and if not paid by the defendant, I hereby undertake to pay the same; and in consideration of the above undertaking the said plaintiffs agree to stay execution until the said 6th day of October if the undersigned, William Marshall, give to Messrs. Woodbridge & Sons satisfactory references as to his ability to pay the amount aforesaid, but not otherwise; and if the references are not satisfactory, then this guarantee to be given up within a week from the present date.

"Dated this 25th day of August, 1862.

"William Marshall, 200 Regent Street,

"For self and co-executor Henry Morten."

And the defendant says that the said references in the said promise and undertaking named were not given, and were not satisfactory; and thereupon the defendant requested the plaintiffs to give up the said promise and undertaking, according to the terms of it, which they refused so to do, and the defendant became and was discharged from performing the same.

Demurrer to the plea, and joinder therein.[30]

WILDE, B. I am of the same opinion. The question turns upon the construction of a guarantee signed by the defendant, whereby, in consideration of the execution being stayed against one Turnbull, the defendant undertook to pay the plaintiffs £90. 1s. 6d. if Turnbull did not. The guarantee goes on to say: "And in consideration of the above undertaking the plaintiffs agree to stay execution until the said 6th day of October, if the undersigned, W. Marshall, give to Messrs. Woodbridge & Sons satisfactory references as to his ability to pay the amount aforesaid, but not otherwise; and if the references are not satisfactory, then this guarantee to be given up within a week from the present date." The question is, what is the meaning of that? The plaintiffs agree that the defendant shall stand in the place of Turnbull, if he will give satisfactory references as to his ability to pay the amount, and, if he does not, there shall be an end of the guarantee. The defendant cannot tell whether the references are satisfactory to the plaintiffs or not, and that provision was inserted for the purpose of enabling the defendant to know whether he is bound by the guarantee.

It is not necessary to decide whether the plaintiffs might renounce the stipulation as to satisfactory references. I will assume that they might; but, if they intended to do so, they should have given notice to the defendant that they waived the benefit of that stipulation. It is said that notice is included in the general allegation in the declaration; but the plea rather shows the contrary, and, if notice was really given, it should have been stated by way of replication.

Judgment for the defendant.

[30] The arguments of counsel and the concurring opinions by Pollock, C. B., and Bramwell, B., are omitted.

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CHAPTER IV

DISTINCTION BETWEEN SURETYSHIP AND OTHER FORMS OF CONTRACTUAL LIABILITY

SECTION 1.—DISTINCTION BETWEEN SURETYSHIP AND OTHER FORMS OF CONTRACTUAL UNDERTAKING, CHIEFLY WITH RESPECT TO THE STATUTE OF FRAUDS

I. Promises Made by the Defendant to the Debtor

EASTWOOD v. KENYON.

(Court of Queen's Bench, 1840. 11 Adol. & E. 438.)

Lord Denman, C. J.[1] The first point in this case arose on the fourth section of the statute of frauds, viz.: Whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of Buttemere v. Hayes, 5 Mee. & W. 456, that this defense might be set up under the plea of non-asssumpsit.

The facts were that the plaintiff was liable to a Mr. Blackburn, on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied. It would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of the opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.[2]

[1] The statement of facts is omitted, as they sufficiently appear in the opinion, only so much of which is printed as relates to the statute of frauds. The arguments of counsel are likewise omitted.

[2] Accord: Hargreaves v. Parsons, 13 M. & W. 569 (1844); Johnson v. Gilbert, 4 Hill (N. Y.) 178 (1843); Tighe v. Morrison, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617 (1889); Mersereau v. Lewis, 25 Wend. (N. Y.) 243 (1840); Barker

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II. Promises Made by the Defendant to the Creditor

(*A*) *At the Time the Credit is Given or Debt Created, etc.*

YEAR BOOK, IX HENRICI V, FOLIO 14, PL. 23.

(Court of Common Pleas, Michaelmas Term, 1422.)

A man brings a writ of debt against another and counts by Strange how such a day, year and place he had recovered a debt of ten pounds in the Exchequer of our Lord the King at Westminster against one T., and the defendant comes to him in the same Exchequer and says to the plaintiff, that if he is willing to release execution against the said T. that then he would become debtor to him for the said ten pounds, in consequence of which conversation he released the execution to T., which is of record, and so he has become debtor to us.

Westbury: You see well enough how he has shown that if he was willing to release the execution to the said T., that then he would become debtor, the which is not sufficient matter in law to charge him, wherefore judgment, &c., and on this demurrer.

Cokayne, J.[3] In my understanding, the matter is not sufficient at all. Wherefore, Ex nudo pacto non oritur actio, &c., so is the opinion, &c.

YEAR BOOK, XII HENRICI VIII, FOLIO 11, PL. 3.

(Court of King's Bench, Michaelmas Term, 1521.)

In the King's Bench one brings action on his case against two executors of one J. S. And counts that one J. N. comes to the house of the plaintiff to buy certain goods, and the said J. S., the testator comes with him and while the said J. S. had the goods, the plaintiff said to him that he was in doubt as to the payment, and the said J. S., the testator said to him, if he does not pay you I will pay you, upon which promise the plaintiff delivered the goods to the said J. N., and then the said J. N. became unable to pay the plaintiff, and then the said J. S. died: and the plaintiff submits that he has left assets to his

v. Bucklin, 2 Denio (N. Y.) 45, 43 Am. Dec. 726 (1846); Ely v. McNight, 30 How. Prac. (N. Y.) 97 (1864); Oliphant v. Patterson, 56 Pa. 368 (1867); Meyer v. Hartman, 72 Ill. 442 (1874), obiter; Crim v. Fitch, 53 Ind. 214 (1876); Carraher v. Allen, 112 Iowa, 168, 83 N. W. 902 (1900).

Similarly it has been held that a promise to the sheriff having a writ of execution against the principal is not within the statute. Reader v. Kingham, 13 C. B. (N. S.) 344 (1862).

[3] Justice of the Common Pleas, 1406–1422.

The case is inserted here to be contrasted with the case next following. The principal case is of the class (B). See post, p. 135, note 21.

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executors to pay all debts and all legacies, and to satisfy him also. The matter in dispute was whether he would have this action against the executors or not. And it was adjudged by all the justices that he should recover by this action for two reasons: one, that because he has no other remedy at the Common Law except by this action: the other, because the plaintiff on the promise of the testator had delivered the goods, and it is not right that his soul should be in jeopardy if he has sufficient to satisfy him, seeing that by his promise he has had a prejudice. And so was Judgment given.

And FINEUX, Chief Justice, said that this is outside of the case where Actio moritur cum persona: for it is where the hurt or damage is corporeal; as if one beats me and dies, my action is gone; or if I die my executors will not have action, for the party cannot be punished when he is dead: but in this case the plaintiff can have what he would have if the party had been alive, to wit the price of his goods: and for this reason this action does not die, for each party can have his remedy; but it is not so in battery, because the writ cannot say that the Executors beat him, and they shall not respond to this, Quere, if the testator being alive would have this action against him or wage his law in this case.

LIVINGSTON v. TREMPER.

(Supreme Court of New York, 1809. 4 Johns. 416.)

This was an action of covenant. The declaration stated that on the 25th July, 1792, one Thomas Berry executed a bond to the plaintiff for £96., conditioned to pay £48. on the 1st November, 1798, with the interest yearly, to be calculated from the 1st November, 1791; that on the 3d December, 1807, the defendant executed a writing, under his hand and seal, by which he covenanted and promised, to and with the plaintiff, that the principal and interest of the bond given by Berry should be paid to the plaintiff, in twelve months thereafter, etc., averring a breach, etc. with the common conclusion.

There was a general demurrer to the declaration, and joinder.[4]

KENT, C. J. We do not wish to hear you on this point. It is too well settled to admit of doubt.

VAN NESS, J. There is a fallacy in the argument of the defendant's counsel. The statute of frauds was never meant to alter the common law. Any promise under seal was valid at common law. The seal imports a consideration, as much as if it was expressed in so many words. The statute of frauds says merely that a promise to pay the debt of another shall not be valid, unless in writing. The statute has no application to a writing under seal.

[4] Argument of counsel is omitted.

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PER CURIAM. The promise to pay, in this case, was in writing and under seal, and is not, therefore, within the statute of frauds, nor any decision under it. The covenant, of itself, conclusively imports a consideration, so that it is not necessary that it should be set forth in the deed. The plaintiff is entitled to judgment, but the defendant has leave to withdraw his demurrer, on payment of costs.

Judgment for the plaintiff.[5]

ALFORD v. EGLISFIELD.

(Court of Queen's Bench, Trinity Term, 1564. Dyer, 230b, pl. 56.)

Note, by the opinion of the Justices of the Bench, that if a purveyor, factor, or servant make a contract for his sovereign or master, for fat beasts, for a certain sum of money, and make a bill of receipt for the beasts to the use or behoof of the sovereign or master, and besides, by the same bill bind himself to payment at a day certain, but do not seal the bill, this is not such a contract as shall charge the purveyor or servant by writ of debt counting upon a buying, but an action on the case will serve on this occasion upon an assumpsit. And this between Alford and Eglisfield.

See of the undertaking of the master for the debt of the servant, &c. East., 10 Eliz. fol. (272 pl. 31 post). And of the undertaking to warrant a term of years. M. 15, fol. 328.

WARD v. COGGIN.

(Court of King's Bench, Hilary Term, 1647. Styles, 6.)

Ward brings action of debt in the Common Pleas against Coggin, and declares that the defendant, in consideration that he, the plaintiff, at the request of the defendant, had sold certain wares to J. S. did assume and promise to him, the plaintiff, that he would pay such a sum of money for them; and for non-payment accordingly he brings his action, and hath a verdict and judgment. The defendant brings his writ of error in this Court to reverse this judgment, and assigns for error, that an action of debt lyes not in this case, because the debt which the defendant promised to pay, and for which the action is brought, was raised and became a duty before the promise made for the payment of it, and so an action of debt cannot be grounded for it on the promise. And the words in the declaration do sound merely upon a promise, upon which a good consideration for an action of the case may be grounded; but not to bring an action of debt.

[5] Accord: Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62 (1893); Douglass v. Howland, 24 Wend. 35 (1840).

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FOSTER v. HALLIMAN.

(Court of King's Bench, Michaelmas Term, 1663. 1 Keb. 512 [87], Id. 627 [106].)

In Action upon the Case on promise by the Defendant, that if the Plaintiff and J. S. do agree of a price, he would pay on Communication of the Sale of a Horse, of which the Defendant having notice promisit, &c. to which promise the plaintiff fidem adhibens, did agree, &c. After Verdict in the Palace Court, it was assigned for error, that here is no Sufficient Consideration, no mention being made that the Agreement for the price was ad Specialem Instantiam of the Defendant: But the Court inclined it was well enough; but the promise being on Record, That if the Plaintiff and J. S. do agree for the Horse that he should be paid, which being a voluntary leaving the Sale to the Plaintiff, it's no Sufficient Consideration.

Adjornatur.

The Defendant promised, that if the Plaintiff do agree with J. S. for the price of a horse, on Communication of the Sale betwixt J. S. and the Plaintiff, That if J. S. did not pay, the Defendant would, which PER CURIAM (it being assigned for Error after Verdict and Judgment in the Palace Court at Westminster) is good enough, in that unless the Defendant had not promised, no Sale had been made; and it's all one, as if he had said, If the plaintiff will agree, the Defendant will pay &c. Judgment affirmed.

STONEHOUSE v. BODVIL.

(Court of King's Bench, 1663. T. Raym. 67, 1 Keb. 439.)

The plaintiff declares upon an Indebitatus assumpsit for Physick, Wares and Commodities provided and delivered for the Daughter of the Defendant at his request; after non-assumpsit and verdict for the Plaintiff, Williams moved in Arrest of Judgment, because it is a Collateral Promise and so no Debt, and consequently the Plaintiff ought to have declared Specially: But the whole Court resolved it well enough. For that, 1st. It is for Wares provided and delivered (for) not (to) the Daughter of the Defendant, and so after a verdict it shall be intended delivered to the Defendant for the Daughter. 2dly. An Action of Debt will lie for this; as if the Father desire one to find Physick for his Daughter, Debt lies against the Father, and so Indebitatus assumpsit; and Judgment was given for the Plaintiff.

AMBROSE v. ROWE.

(Court of King's Bench, Michaelmas Term, 1685. 2 Show. 421.)

Indebtatus for prosecuting suits as an attorney for B. at the request of the defendant.

Upon motion in arrest of judgment it was held good: and the case of Sands v. Trevilian, Cro. Car. 107, 193, denied to be law; for that

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though soliciting in another's cause will not raise a contract from J. S. yet an express promise from J. S. to pay for the solicitations of J. N.'s cause, will make it a debt: as if I build a house for J. S. at the request of J. N. and J. N. promises to pay me, debt will lie; so in case of a surgeon's cure; and there is no difference between those cases and this: it is true, it will not raise a promise, but an express promise will well ground an action.

And JEFFERIES, Chief Justice, said, that he thought Rolle's argument in that case of Sands v. Trevilian not to be answered. See 3 Jac. I, c. 7, and 2 Geo. II, c. 23.

See Woodhouse v. Bradford, 2 Roll. R. 76. See Sands v. Trevilian, Cro. Car. 107.

ROZER v. ROZER.

(Court of Common Pleas, Trinity Term, 1682. 2 Ventris, 36.)

An Indebtitatus Assumpsit pro parcell' Corii ad specialem instantiam and requisitionem of the defendant, sold and delivered to J. S. Et sic inde Indebitat' existens the defendant promised to pay.

Upon non-assumpsit pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment that there is no promise laid, and no reason to presume a promise, when 'tis the very ground of the action, though after a verdict. And admitting there were a promise; yet it being collateral it did not make a debt, but should have been brought as an action upon the case. Mo. 702, and Dyer, 230. And hereupon judgment was stayed. Though (as I hear) in the King's Bench about two years since, between Derby and Kent, they held such a case well enough after a verdict. Quære.[6]

AUSTEN v. BAKER.

(Court of King's Bench, 1699. 12 Mod. 250.)

Assumpsit against Baker upon a promise supposed to be made by him to pay for goods delivered by the plaintiff to A.

HOLT, Chief Justice, took this difference: If B. desire A. to deliver goods to C. and promise to see him paid, there assumpsit lies against B.; though in that case he said, at Guildhall he always required the tradesman to produce his books to see whom credit was given to.[7] But if after goods delivered to C. by A., B. says to A. "You shall be paid for the goods," it will be hard to saddle him with the debt.

[6] Accord: Chicago & Wilmington Coal Co. v. Liddell, 69 Ill. 639 (1873); Wood v. Benson, 2 Cromp. & J. 94 (1831); Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826 (1891).

[7] See Cooper v. Gibbons, 3 Camp. 363 (1813).

In Boykin v. Dohlonde, 37 Ala. 583 (1861), the court said: "The entry in the books of the seller is often of great importance, in determining to whom cred-

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WATKINS v. PERKINS.

(Court of King's Bench, Easter Term, 1702. 1 Ld. Raym. 224.)

Per HOLT, Chief Justice. If A promise B being a Surgeon, that if B cure D of a wound, he will See him paid; this is only a promise to pay if D does not, and therefore it ought to be in writing by the Statute of Frauds. But if A promise in such case, that he will be B's paymaster, whatever he shall deserve; it is immediately the debt of A, and he is liable without writing.

it was given. Being made by the seller, it is, of course, of much greater weight when against him, than when it sustains his claim. If, on production of the plaintiff's books, it appears that the defendant was not originally debited there, but that the goods were charged against the person receiving them, this fact, if unexplained by other circumstances, would be very strong, if not conclusive, evidence that credit was given to the person receiving the goods."

Holding that the entry against another than the defendant may be explained away by other evidence of the plaintiff are: Lusk v. Throop, 189 Ill. 127, 59 N. E. 529 (1901); Myer v. Grafflin, 31 Md. 350, 100 Am. Dec. 66 (1869); Walker v. Richards, 41 N. H. 388 (1860).

Similarly a book entry against the defendant does not preclude his evidence that the real debtor was another. Mackey v. Smith, 21 Or. 598, 28 Pac. 974 (1892); Kinloch v. Brown, 1 Rich. Law (S. C.) 223 (1845); Cutler v. Hinton, 6 Rand. (Va.) 509 (1828). Contra: Langdon v. Richardson, 58 Iowa, 610, 12 N. W. 622 (1882).

In the Common Pleas of New York the plaintiff was held to have "put his own construction upon the agreement" by charging the goods, not to the defendant, but to another party. Dixon v. Frazee, 1 E. D. Smith 32 (1850). But the book entry against the defendant is not conclusive that no credit was given to another, but only relevant evidence on the question of his sole and original liability. Cowdin v. Gottgetreu, 55 N. Y. 650 (1873). And an unexplained charge against a third party in the absence of all other evidence furnishes no possible ground of recovery. McRoberts v. Mathews, 18 App. Div. 624, 45 N. Y. Supp. 431 (1897); Bussel v. Sagor, 27 Misc. Rep. 810, 57 N. Y. Supp. 221 (1899), accord.

The doctrine of Birkmyr v. Darnell, Salk. 27 (see page 119), is followed in Hetfield v. Dow, 27 N. J. Law, 440 (1859).

In Merriman v. Liggett, 1 Wkly. Notes Cas. 379 (1875), Common Pleas of Philadelphia, the language used was to "let Samuel Marsh have what goods he might want within the bounds of reason, and they, the defendants, would pay for them." The account was against Marsh on the books of the plaintiff.

[Sharswood, J. "Cannot two persons be both originally liable on the same contract?"

[Agnew, C. J., and Sharswood, J. "The question as to the effect of the manner in which the liability of the defendants below was entered in the plaintiff's book was, when taken with the testimony of J. Liggett, a question of fact for the jury, and not a question of law."]

For a case where goods were bought by A. to be delivered to B., see Watson v. Porzel, 158 Pa. 513, 27 Atl. 866 (1893).

A promise "that the plaintiff should have its account for the goods which were to be sold to the P. Co. under the above-mentioned contract guaranteed" is a promise within the statute. Putnam Machine Co. v. Cann, 173 Pa. 392, 34 Atl. 67 (1896).

See post, p. 130, Cooper v. Gibbons, 3 Camp. 363 (1813).

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BUCKMYR v. DARNALL.

(Court of Queen's Bench, 1704. 2 Ld. Raym. 1085.)

An action upon the case, wherein the plaintiff declared that the defendant, in consideration the plaintiff, at his request locaret et deliberaret cuidam Josepho English a gelding of the plaintiff's ad equitandum et itinerandum usque ad Reading in comitatu Berks, assumpsit et promisit the plaintiff, quod the said Joseph and Charles the said gelding to the plaintiff redeliberarent, &c. Upon non-assumpsit pleaded, this cause came to trial before Holt, Chief Justice, at Westminster-Hall; and the counsel for the defendant insisting, that the plaintiff ought to produce a note in writing of this promise within the statute of frauds, 29 Car. II, c. 3, § 4. And the Chief Justice doubting of it, a case was made of it, and ordered to be moved in court, to have the opinion of the other judges. And now it was argued this term by Serjeant Darnall for the defendant, and by Mr. Raymond for the plaintiff. And it was insisted for the defendant, that this case was within the statute of frauds, 29 Car. II, c. 3, § 4, for it was a promise to answer for the default and miscarriage of the person the horse was lent to. The very letting out and delivery of the horse to English implies a contract by English to redeliver him, and he is bound by law so to do, and consequently the defendant is to answer for the default of another. In a case 2 Will. and Mar. your Lordship settled this rule, that where an action will lie against the party himself, there an undertaking by J. S. is within the statute; and where no action will lie against the party himself, there it is otherwise. And therefore I agree this case, that if a man should say to another, do you build a house for J. S. and I will pay you; that case is not within the statute, because there J. S. is not liable. But this case is not more than this, if a man should say, do you let J. S. have goods, and if he does not pay you I will, and this is within the statute because an action will lie against J. S. for the money for the goods. Or if a man should say, take J. S. into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible, that is also within the statute.

To this it was answered for the plaintiff, that here the credit was wholly given to the defendant; that that rule of the serjeant's must be understood, where an action does or does not lie against the party himself on the contract, and not where an action does or does not lie against him upon collateral respects. And therefore in this case for an actual conversion, or for refusing to redeliver the horse, English may be charged in trover or detinue; yet he being not chargeable upon the contract, the case is not within the statute. This contract cannot be said properly to be a promise to answer for the default or miscarriage of another, unless English were liable by the first contract.

Upon the first motion and arguing this case, the three judges against Powys seemed to be of opinion, that this case was not within the stat-

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ute, because English was not liable upon the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And POWELL, Justice, said, that that rule, of what things shall be within the statute, is not confined to those cases only where there is no remedy at all against the other, but where there is not any remedy against him on the same contract. This case is just like the case where a man says, "send goods to such a one, and I will pay you;" that is not within the statute, for the seller does not trust the person he sends the goods to. So here, the stable-keeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent he may be charged in detinue, or trover and conversion, which is a collateral action.

POWYS, Justice, said, that there was a trust to English, for the very lending of the horse necessarily implies a trust to the person he is lent to, and consequently the defendant in this case is to answer for the default of another, and is within the statute.

POWELL, Justice, agreed, that if a man should say, lend J. S. a horse, and I will undertake he shall pay the hire of it; or send J. S. goods and I will undertake he shall pay you; that those cases would be within the statute: and agreed with POWYS, that if any trust were given to English, then the case would be within the statute. But he and the CHIEF JUSTICE and GOULD held that here was no credit given to English; and the CHIEF JUSTICE agreed with him, that if there had, this promise would have been but an additional security, and within the statute. And the CHIEF JUSTICE said, that if a man should say, "let J. S. ride your horse to Reading, and I will pay you the hire," that is not within the statute, no more than if a man should say, "deliver cloth to J. S. and I will pay you." He said also, that a bailee of an horse for hire is not bound to redeliver him at all events, but if he be robbed of him without fraud in him, he is excused. And so it was ruled in the case of Coggs v. Bernard, 2 Ld. Raym. 916.

The last day of the term the CHIEF JUSTICE delivered the opinion of the court. He said, that the question had been proposed at a meeting of judges, and that there had been great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant; but that the judges of this court were all of opinion, that the case was within the statute. The objection that was made was, that if English did not redeliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered, that English may be charged on the bailment in detinue on the original delivery, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and consequently this promise by the defendant is collateral, and is within the reason, and the very words of the statute; and is as much so, as if, where a man was indebted, J. S. in consideration that the debtee would forbear the

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man, should promise to pay him the debt, such a promise is void, unless it be in writing. Suppose a man comes with another to a shop to buy, and the shopkeeper should say, "I will not sell him the goods, unless you will undertake he shall pay me for them," such a promise is within the statute: otherwise, if a man had been the person to pay for the goods originally. So here, detinue lies against English the principal; and the plaintiff having this remedy against English the principal, cannot have an action against the defendant, the undertaker, unless there had been a note in writing.[8]

[8] No stereotyped form of expression is conclusive as to whether a debt or a special promise to answer for another's debt has been created. "The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise." Davis v. Patrick, 141 U. S. 489, 12 Sup. Ct. 58, 35 L. Ed. 826 (1891).

In Tomlinson v. Gill, Ambler 330 (1756), Lord Hardwicke said: "The distinction taken in Buckmire v. Darnell, 6 Mod. 248, 1 Salk., 2 Ld. Raym., is a very slight and cobweb distinction. The judges were much divided upon the question. I agree with the many."

The correct interpretation and application of the statute depends upon preserving the distinction between a "special promise" and a "debt" at common law. The statute was designed to render unenforceable all verbal "special promises," but left unaffected all verbal debts. The test is therefore whether the transaction constitutes at common law a "special promise" or a "debt." Professor Ames, in 8 Harvard Law Review, pp. 263, 264, has pointed out this test. He was the first to do so. In the former case the absence of a writing prevents the enforcement of the verbal promise; in the latter case no writing is necessary. At common law a debt was created by the physical transfer of chattels or by the performance of some service in exchange for a promise to pay a specific sum of money therefor. (Illustrations of contracts of debt will be found in 52 Am. Law Reg. p. 770 et seq.) But the contract of debt could never arise if in exchange for a quid pro quo the promise was to pay in case another person who received the quid pro quo did not pay. One quid pro quo could never do double duty to support two contracts of debt—the one contingent upon the other.

Judge Hare (Contracts, p. 122 [1887]), shows that this characteristic of debt led ultimately to the action on the case upon the special promise to answer for the debt of another. Rozer v. Rozer, 2 Ventris, 36 (1681), accord, supra, p. 117.

Hence a promise by A. to pay, if B. did not, created only a special promise enforceable in an action upon the case before the statute, Foster v. Holyman, supra [1 Keble, 627 (1663)], but after the statute a writing was required. But if B. at A.'s request either delivered goods to C. or performed a service for C.'s benefit, and no credit whatever was given to C., A. became B.'s debtor thereby. The transaction gave rise to the contract of debt. Stonehouse v. Bodvil, supra [1 Keble, 439 (1662)]. Hence after the statute if a debt existed no writing was necessary. Ambrose v. Rowe, supra [2 Showers, 421].

The action of debt would never lie upon any simple contract except the contract of debt. The action of indebitatus assumpsit was invented in the sixteenth century, so that a contract of debt might be sued in assumpsit and the plaintiff thus obtain a trial by jury. The action of indebitatus assumpsit would lie wherever the action of debt would lie, but not otherwise, aside from its use by Lord Mansfield and subsequently to enforce quasi contracts. Hence indebitatus assumpsit would not lie on any simple contract, except the contract of debt. Accordingly, as there was no debt created in Rozer v. Rozer, supra, there was no recovery. The case decided that indebitatus assumpsit will not lie on a promise to pay for goods sold and delivered to X. at the de-

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JORDAN v. TOMPKINS.

(Court of King's Bench, 1703. 2 Ld. Raym. 982.)

Indebitatus assumpsit, for the plaintiff ad requisitionem of the defendant did provide meat, drink and lodging for J. S. and J. D. and the plaintiff had judgment by default. Mr. Acherley moved in arrest of judgment that an indebitatus assumpsit did not lie in this case, but the plaintiff ought to have declared specially.

But per HOLT, Chief Justice, et curiam. It is well; for it is a contract between the plaintiff and defendant, and no action lies against J. S. or J. D.

MATSON et al. v. WHARAM.

(Court of King's Bench, Michaelmas Term, 1787. 2 Term R. 80.)

This was an action for goods sold and delivered, and tried before Wilson, J., at the last Assizes at Kingston upon Hull, when a verdict was found for the plaintiffs, subject to the opinion of the court on the following case:

In January, 1785, the defendant Wharam applied to Matson, one of the plaintiffs, and asked him if he was willing to serve one Robert

fendant's request. If the action here had been case on the special promise, the lack of a writing would have been fatal to the plaintiff in 1681.

If any credit whatever is given to a person other than the promisee, the defendant's promise is "pro tanto," a "special promise to answer for the debt of another" and not a debt, Rozer v. Rozer, supra, and hence must be in writing. Though in writing, indebitatus will not lie. Mines v. Sculthorpe, 2 Campbell, 215 (1809), by Lord Ellenborough.

It is therefore plain that the liability of a surety can never be a debt, but must always be an assumpsit.

It is also plain that, whenever the contract of debt is created, no writing whatever is necessary, as the statute of frauds does not apply.

The well-known case of Lakeman, Appellant, v. Mountstephen, Respondent, L. R. 7 H. L. 17 (s. c. 43 L. J. Q. B. 188, 30 L. T. 437, 22 W. R. 617 [1874]; the case in the Court of Exchequer Chamber and in the Court of Queen's Bench is reported in L. R. 5 Q. B. 613 [1870], 7 Q. B. 196 [1871], 39 L. J., Q. B. 275 [1870], 41 L. J., Q. B. 67 [1871]), belongs to the class of cases now under consideration. The credit was given to the defendant at the time he made the promise on which the action was brought, and as there was then no subsisting liability of the municipality of Brixham, the jury were allowed to find whether the words, "Go on, Mountstephen, and do the work, and I will see you paid," were or were not an original undertaking (i. e., an undertaking, to use Lord Cairns' expression, "as a matter of primary liability to pay for the work that would be done").

New York.—The doctrine of the principal case is applied in Carville v. Crane, 5 Hill, 483, 40 Am. Dec. 364 (1843). A. requested B. to sell goods to C., promising by parol to indorse C.'s note for the price. Held, on demurrer, to be within the statute. Allen v. Scarff, 1 Hilt. 209 (1856), accord. But where the defendant said, "If my nephew should call for papers, I will be responsible for the papers that he shall take * * * to sell and distribute, etc., as a news-carrier," a verdict for the plaintiff was held justifiable on the ground that "this was never the debt of the nephew." Chase v. Day, 17 Johns. 114 (1819). Flanders v. Crolius, 1 Duer, 206 (1852), accord. "If the whole credit

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Coulthard of Pontefract with groceries; he answered they dealt with nobody in that part of the country, and did not know Coulthard; to which the defendant, Wharam replied, if you do not know him you know me, and I will see you paid. Matson then said he would serve him; and Wharam answered, he is a good chap, but I will see you paid. A letter was afterwards received by the plaintiffs from Coulthard, containing an order for goods to the amount of £7. and the goods were afterwards sent to Coulthard accordingly. The plaintiffs made Coulthard the debtor for these goods in their books. They afterwards applied to Coulthard for payment of the debt by letter, and receiving no answer, they then applied to the defendant, Wharam, who refused to

be not given to the person who comes in to answer for another, his undertaking is collateral, and must be in writing." Brady v. Sackrider, 1 Sandf. 514 (1848), where the Marine Court was reversed on the facts. In Read v. Ladd, 1 Edm. Sel. Cas. 100 (1845), a verdict of sole liability was set aside, as there was evidence of a collateral indebtedness.

Where A., one party to a contract, refused to complete it because of the failure of B., the other party, to pay an installment for materials furnished, C.'s promise, "Go on and furnish the stuff, and he would see it was paid for," followed by the supplying of the materials to B. and the charging of them against B. and not against C., was held insufficient evidence to justify a finding against C. on such verbal promise. Payne v. Baldwin, 14 Barb. 570 (1853); Brown v. Bradshaw, 1 Duer, 199 (1852). So a request to a physician to attend upon a third person, accompanied by a promise to pay therefor, is not within the statute. Hanford v. Higgins, 1 Bosw. (N. Y.) 441 (1857).

In Hazeltine v. Wilson, 55 N. J. Law, 250, 26 Atl. 79 (1893), the defendant, acting as agent for Keenan, applied to plaintiff to procure a loan for Keenan. Plaintiff said: "Mr. Wilson, to whom shall I look for the expenses?" Wilson replied: "I am getting this money as an accommodation for Peter Keenan, but I will be responsible." Held, that Wilson was liable.

Pennsylvania.—The doctrine of the principal case is thoroughly recognized.

No particular form of expression, however, is decisive of the question whether the promise is original or collateral. Thus the words "see it paid," or "see you paid," when spoken under circumstances establishing an intention to merely become a surety, will not create an original undertaking. Miller v. Long, 45 Pa. 350 (1863); Gable v. Graybill, 1 Pa. Super. Ct. 29 (1895). Although the same words under circumstances from which an intention to become primarily liable may be properly inferred will create an original obligation.

Thus in a case where a stepfather said to a physician: "If the boy dies I don't want any blame resting on me. You go and get the doctor (i. e., a surgeon) and do all that you can for the boy. I will see that you get your pay." Held, that on this evidence the jury might find an "original undertaking" on the part of the defendant. Boston v. Farr, 148 Pa. 220, 23 Atl. 901 (1892). See, to same effect, Patton's Ex'r v. Hassinger, 69 Pa. 311 (1871). "A contract to give a guaranty is required to be in writing as much as a guaranty itself." Per Pollock, C. B., in Mallet v. Bateman, L. R. 1 C. P. 163 (1865).

In Dougherty v. Bash, 167 Pa. 429, 31 Atl. 729 (1895), "defendant stated that if plaintiffs would sell C. W. & Co. all the goods in their line which the said C. W. & Co. desired, and would get what cash plaintiffs could on account, and would take the notes of C. W. & Co. for the balance of the account, drawn to said C. W. & Co.'s own order and by them indorsed, that he, defendant, would discount said notes for plaintiffs without recourse." Held, the promise was within the statute. Eshleman v. Harnish, 76 Pa. 97 (1874), accord. So in Morley v. Boothby, 3 Bing. 107 (1825), a promise that a certain draft of the plaintiff to his own order on a third person shall be paid was held to be a promise to answer for the debt, default, etc., of another.

See, also, Weyand v. Crichfield, 3 Grant. Cas. (Pa.) 113 (1862); Warrick v. Grosholtz, 14 Leg. Int. (Pa.) 117 (1857), Hare, J.

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pay the money. There was no promise in writing made by the defendant. The question for the opinion of the court is, Whether the plaintiffs are entitled to recover?

Garrow, for the plaintiffs, attempted to take a distinction which had been before taken in Jones v. Cowper, Cowp. 227, and Mawbrey v. Cunningham, there cited, between a promise for the payment of goods for another person before delivery and after; and contended that in the former case it amounted to an original undertaking, and so was not within the statute of frauds. And he also cited Reed v. Nash, 1 Wils. 305, Fish v. Hutchinson, 2 Wils. 94, and Peckham v. De Faria, M. 22 Geo. III, B. R. But

THE COURT were clearly of opinion that that distinction had been overruled; and

BULLER, J., added, that he argued the case in Cowper, the facts of which were these: A person, who was going abroad, wished to make some provision for his mother-in-law in his absence, and said to a baker, "You must supply my mother-in-law with bread, and I will see you paid." That case was tried before Nares, J., at Bristol. I was for the plaintiff; and cited the case of Mawbrey v. Cunningham (Sittings after Hil. 1773, at Guildhall), in which Lord Mansfield said: "This is a promise made before the debt accrues; and what is the reason of the tradesman's requiring that promise? It is because he will not trust the person for whose use the goods are intended." And the plaintiff obtained a verdict. But Nares, J., overruled this determination, and non-suited the plaintiff; and this court afterwards refused to grant a new trial. If this were a new question, the leaning of my mind would be the other way; for Lord Mansfield's reasoning in the case of Mawbrey and Cunningham struck me very forcibly. But the authorities are not now to be shaken; and the general line now taken is that, if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds, 29 Car. II, c. 3.

Lambe was to have argued for the defendant.

PER CURIAM. Judgment for the defendant.[9]

BUTCHER v. ANDREWS.

(Court of King's Bench, 1698. 1 Salk. 23.)

Assumpsit, for that the defendant, in consideration that the plaintiff at his request would lend the defendant's son any sum of money, and let him have any goods, so as the money lent and goods sold exceeded

[9] Accord: Commercial, etc., Bank v. Smith, 107 Wis. 574, 83 N. W. 766 (1900); Mease v. Wagner, 1 McCord (S. C.) 395 (1821).

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not £5. promised to pay him; and avers that he lent him £5. in money, and sold him goods upon credit to the value of £5., and declares also that the defendant was indebted to him for so much money mutuo dat & accomodat, to the son at the defendant's request, &c. Upon non assumpsit, verdict pro quer and £3. given in damages. Upon motion in arrest of judgment it was allowed, That the defendant could not be indebted for more than £5., for he engaged for no more; so that if the jury had given more, it had been naught. Here the jury having given less than £5. this was urged to have helped the declaration. Sed non allocatur; for first, non constat to the court, but the defendant has paid £5. already, and that this is now claimed over and above. 2dly, That the declaration was naught; for the money being lent to J. S. the defendant cannot be obliged as for a debt, and liable to an indebitatus, but to a special assumpsit, as being but collaterally bound by his promise; for the same money cannot be lent to two, otherwise had the money been only delivered to the son at the father's request, for then the loan had been to the father; quod nota.[10]

KEATE v. TEMPLE.

(Court of Common Pleas, Michaelmas Term, 1797. 1 Bos. & P. 158.)

Assumpsit for goods sold and delivered, work and labour, and common money counts.

Plea. Non assumpsit.

This cause was tried before Lawrence, J., at Winchester summer assizes, 1797, when the principal facts in evidence were as follow:

The plaintiff was a tailor and slopseller at Portsmouth, and the defendant the first lieutenant of His Majesty's ship the Boyne. When that ship came into port, the defendant applied to a third person to recommend a slopseller who might supply the crew with new cloaths, saying, "He will run no risk; I will see him paid." The plaintiff being accordingly recommended, the defendant called upon him, and used these words, "I will see you paid at the pay table; are you satisfied?" The plaintiff answered, "Perfectly so." The cloaths were delivered on the quarter deck of the Boyne. Slops are usually sold on the main deck. The defendant produced samples to ascertain whether his directions had been followed. Some of the men said, that they were not in want of any cloaths, but were told by the defendant that

[10] As goods may be sold or the money lent to two jointly, a joint contract is not within the statute, Cooper v. Gibbons, 3 Camp. 363 (1813), post, p. 130; Gibbs v. Blanchard, 15 Mich. 292 (1867).

The statement that "the same money cannot be lent to two" obviously refers to a situation where no joint debt arises.

Where the promisor is a member of a partnership, to which he guarantees the payment of a third person's debt, the promise is not within the statute. Hoyle v. Hoyle, 1 Ch. 84 (1893).

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if they did not take them, he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers only. The clothing of the crew in general was light and adapted to the climate of the West Indies, where the ship had been last stationed. Soon after the delivery, the Boyne was burnt, and the crew dispersed into different ships. On that occasion, the plaintiff, having expressed some apprehensions for himself, was told by the defendant, "Captain Grey [the captain of the Boyne] and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the Commerce de Marseilles in order to pay the crew of the Boyne; at which time the defendant stood at the pay table, and having taken some money out of the hat of the first man who was paid, gave it to the plaintiff; the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioner to stop the pay of the crew, who answered that it could not be done.

The learned judge in his directions to the jury said, that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the defendant as immediately responsible, the plaintiff was entitled to a verdict; but if they believed that at the time when the goods were furnished, the plaintiff relied on being able, through the assistance of the defendant, to get his money from the crew, they ought to find for the defendant.

Verdict for the plaintiff £576. 7s. 8d.[11]

EYRE, C. J. There is one consideration, independent of every thing else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is £576. 7s. 8d. and this against a lieutenant in the navy; a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or of the slopseller to furnish the goods on his credit, to so large an amount. I can hardly think that had the Boyne not been burnt, and the plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given the preference to the latter. The circumstances of this case create some prejudice against the defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these cloaths against their inclination. But it was in evidence, that though they were pretty well cloathed, yet their cloaths were adapted to a warm climate rather than to the service in which they were to be engaged. It was therefore the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know that a sailor is so singular a creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon,

[11] The argument of counsel is omitted.

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without force, even to bring up his hammock upon deck to be aired. We know that he will risk any danger in order to employ his money in a way that he likes, rather than lay it out in that provident method which his situation may require. The whole of the imputation then on the defendant and Captain Grey amounts to this, that when the men were to be cloathed, they wished them to be somewhat well dressed. I do not know but that this circumstance may have had some influence with the jury. But I do not feel the force of it when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case it is apparent that the men were to pay in the first instance: the defendant's words were "I will see you paid at the pay table; are you satisfied?" and the answer then was, "Perfectly so." The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, Whether the slopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund, rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum? Considering the whole bearing of the evidence, and that the learned judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial.

HEATH, J. I am of the same opinion.

ROOKE, J. I am of the same opinion.

Rule absolute on payment of costs.

MINES v. SCULTHORPE.

(Court of King's Bench, at Nisi Prius, 1809. 2 Camp. 215.)

Indebitatus assumpsit for goods bargained and sold; and for goods sold to defendant, and at his request delivered to one Cecil Hicks; with the usual money counts. Plea, the general issue.

Hicks, a retail shopkeeper, applied to the plaintiff, a wholesale dealer, to be furnished with a quantity of cheese in the way of his trade and referred him to the defendant as a person who would be accountable for what should be sent. The plaintiff thereupon wrote a letter to the defendant, requiring to know whether he consented to this. The defendant returned the following answer:

"Sir: In reply to yours of yesterday respecting Mr. Hicks, now inform you I will answer for the payment of goods sent to him to the amount of 100*l.* for six months. Hope, after that, you will not think it necessary for me to be longer accountable, as you will, of course, become well acquainted with his manner of doing business, and that that as well as his payments, will be quite satisfactory. I am," &c.

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Goods were accordingly supplied by the plaintiff to Hicks, for the value of which the present action was brought.[12]

Lord ELLENBOROUGH. The goods were certainly sold to Hicks. The defendant's undertaking is collateral, and ought to have been declared on specially.

Plaintiff non-suited.[13]

SMITH BROS. & CO. v. MILLER.

(Supreme Court of Alabama, 1907. 152 Ala. 485, 44 South. 399.)

Assumpsit.

Appeal from Marshall Circuit Court. Heard before Hon. W. W. Haralson.

Action by Smith Bros. & Co. against J. M. Miller. Judgment for defendant. Plaintiffs appeal. Reversed and remanded.

This is an action of debt begun by appellants against appellee. The pleas were the general issue, payment, accord and satisfaction, and set-off. The facts are sufficiently stated in the opinion of the court. The person mentioned as Miller, on the question as to whether the goods were sold to Miller and Aldredge, was not the defendant, but a brother of his. * * *[14]

TYSON, C. J. This action was brought to recover $78.80 due by account, resulting in a judgment for defendant. Defendant claimed credit for a bale of cotton which the testimony tends to show was delivered by him to the wife of one of the plaintiffs at their home; and it also tended to show that this bale was received by the plaintiffs. Against plaintiff's objection the receipt given by the wife for the cotton was admitted in evidence. There was no error in this ruling.

Among the items in the account sued on were two for goods sold and delivered to one Aldredge and one Miller. Some of the testimony tended to show that the credit for these goods was extended to defendant alone. Other testimony tended to show that the credit was given to Aldredge and Miller, and that defendant agreed to see it paid. Again, other testimony tended to show that, while the credit for the goods was given to Aldredge and Miller, the plaintiffs by agreement

[12] The argument of counsel is omitted.

[13] Innumerable contemporaneous cases are in accord. Kent v. Derby, 1 Vent. 311 (1678), is an erroneous decision; Rainsford, C. J., dissentiente.

The gradual disappearance of the distinction between a debt and a special promise may be seen from the following language of Wood, L. C. B., in Cope v. Joseph, 9 Price 160 (1821): "In this case the person guaranteeing in this manner the payment of the debt about to be incurred by the purchaser of the goods became at least as much the debtor of the plaintiff for the goods furnished as the purchaser himself, for any sum within the amount of his guarantee. To that extent he made himself directly responsible; and there can be no doubt that debt might be supported against him on this guarantee to that amount." This statement is not and never was the law.

[14] The statement is abridged and the arguments of counsel are omitted.

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with appellant released Aldredge and Miller from their liability, upon the consideration of his (defendant's) promise to pay for the goods. On this aspect of the case the court charged the jury that "if the goods were sold to Aldredge and Miller, and if credit was extended to them, then there could be no recovery therefor against defendant, unless he agreed in writing to see it paid." To this the plaintiffs excepted. The exception was well taken. If the credit was given defendant, notwithstanding the goods were delivered to Aldredge and Miller, his promise or undertaking to pay for them was original and not within the statute of frauds, and was not required to be in writing. Pake v. Wilson, 127 Ala. 242, 28 South. 665, and cases there cited.

Again, if Aldredge and Miller were entirely released or discharged, and the obligation or promise of defendant was substituted for theirs, the statute of frauds has no application. The new debt thus created is binding on the substituted promisor, the defendant. "It is his own debt, and can no longer be said to be the debt of another." Thornton v. Guice, 73 Ala. 321, and cases there cited; Carlisle v. Campbell, 76 Ala. 247.

There is clearly no merit in the next exception, taken to the oral charge of the court.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

IONA SAVINGS BANK v. BOYNTON.

(Supreme Court of New Hampshire, 1896. 69 N. H. 77, 39 Atl. 522.)

Assumpsit, on the promissory note of the defendant, a married woman. Facts found by the court. The note was signed by her at the request of her husband, who told her he needed the money. She signed the note to help her husband in his business, and authorized him to secure its discount and dispose of the proceeds. The defendant's husband applied to the plaintiffs for a loan of $5,000, with 60 shares of the capital stock of the Tilton Hosiery Company as collateral. They declined to make the loan, but told him that if his wife desired to borrow that amount with the same security the loan would be made. Shortly afterward he brought to the bank the note in suit, with the collateral above named, and received the amount of the plaintiffs. He deposited the avails in the Citizens' National Bank to the credit of the Tilton Hosiery Company, of which he was treasurer. The defendant never met or had any talk with any officer of the bank relative to the loan. Upon the foregoing facts the court found a verdict for the plaintiffs for the amount due on the note, and the defendant excepted.

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WALLACE, J. The case discloses that the plaintiffs refused to make the loan to the husband, but did make it to the wife alone upon a note signed by her to which the husband was not a party, and that the hiring of the money by the defendant from the plaintiffs was the independent contract of the wife as principal and not as the surety or guarantor of the husband. The fact that she hired the money with the intention of letting her husband have it to assist him in his business, and did so let him have it, did not impair or suspend her legal capacity to make the contract, or make it an undertaking for him or in his behalf within the meaning of the statute. Parsons v. McLane, 64 N. H. 478, 13 Atl. 588; Jones v. Holt, 64 N. H. 546, 15 Atl. 214; Wells v. Foster, 64 N. H. 585, 15 Atl. 216.

Exception overruled.[15]

PARSONS, J., did not sit. The others concurred.

COOPER et al. v. GIBBONS.

(Court of Common Pleas, at Nisi Prius, 1813. 3 Camp. 363.)

This was an action for the value of a pipe of wine; and the question was, whether it had been sold by the plaintiffs to the defendant and one Robertson, deceased, jointly, or the credit had been given to Robertson exclusively.

The plaintiffs proved that the wine had been delivered at a house in which the defendant and Robertson, who were partners in trade, were living together.

The circumstance chiefly relied upon by the defendant was that notice had been given to produce the plaintiffs' books containing any entry of this sale, and that they were not produced.[16]

GIBBS, J. I have considered this subject a good deal, and I am of opinion that the jury are not authorized to draw any such inference from the circumstance relied upon. The non-production of the plaintiffs' books, after a notice to produce them, merely entitles the defendant to give parol evidence of their contents.

The plaintiffs had a verdict.[17]

[15] See Littlefield v. Dingwall, 71 Mich. 223, 39 N. W. 38 (1888), where a married woman, though joint maker of a note, was held to be only a surety. The statute referred to in the opinion in the principal case is Pub. St. N. H. c. 176, § 2: "Provided also that no contract or conveyance by a married woman, as surety or guarantor for her husband, nor any undertaking by her for him or in his behalf shall be binding on her. * * *"

[16] The argument of counsel is omitted.

[17] Accord: Gibbs v. Blanchard, 15 Mich. 292 (1867). See cases collected in Throop on Validity of Verbal Agreements, pp. 282–298 (1870). It is impossible to see how a promise by two jointly could be a promise by either to answer for the default of the other. If such were the case, either joint contractor could be sued separately—a conclusion inconceivable at the common law. An argument ab inconveniente has been urged in favor of a contrary view (Throop on the Validity of Parol Agreements, pp. 282–298 [1870]), where,

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(B) *After the Original Credit is Given or Debt Created, etc.*

HAWKINS v. PARKER.

(Court of King's Bench, Trinity Term, 1614. 2 Bulst. 256.)

In an action upon an account, the Case appeared to be this: The Defendant, by his Deed, did acknowledge the receipt of £100. from the plaintiff, to be employed by him in Merchandize, and covenanted at his return, to give unto him a sufficient account of this, and of his bestowing of it. Upon his return, the Plaintiff brought against him this Action of account. The Defendant pleaded, that at his return he tendered an account unto the Plaintiff, the which he refused. 28 H. VIII, Dyer, fol. 20, Cores Case, was cited; the Case of Pruens, That a man may have an Action of Debt, Covenant or Account, upon the Receit.

DODDERIDGE. Though there is here no word of account, yet in this Case here, upon this his receipt, the Plaintiff may well have an action of Accompt, for the Covenant doth not take away his Action of Account: The Court was clear of opinion, that the Action of Account did well lie against him at his return, for that this is not taken away by his covenant, and so by the Rule of the Court, Judgment was given for the Plaintiff.[18]

SWAN et al. v. NESMITH et al.

(Supreme Judicial Court of Massachusetts, 1828. 7 Pick. 220, 19 Am. Dec. 282.)

Assumpsit. The action was entered in the Common Pleas at September term, 1827. The declaration then contained three counts. The first alleged that the defendants were indebted to the plaintiffs, on the balance of accounts, in the sum of $568.79, and that in consideration thereof they promised to pay that sum on demand, with interest and damages for the non-acceptance of the plaintiff's draft. The second was for money had and received, and the third upon an insimul computassent, each for the same sum.

to the promisee's knowledge, the entire benefit is to be received by one only of two joint promisors.

[18] The principal case shows the action of account in common use before the enactment of the statute of frauds. The question is suggested whether, if the goods delivered to the defendant to dispose of and render an account to the plaintiff were security for a debt of a third person to the plaintiff, the defendant's agreement to render such account would be a special promise to answer for the debt of another. The author has elsewhere advanced the view that the statute of frauds did not apply to such a transaction, because the statute was directed against the action of assumpsit, and not against the action of account. See post, p. 135, note to Williams v. Leper, 3 Burr. 1886 (1766).

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At December term, 1827, of that court, the plaintiffs offered three new counts as amendments. The first alleged that the defendants, in consideration that the plaintiffs had intrusted them with goods to be by them sold, promised to pay the plaintiffs, on demand, the sum for which the goods should be sold, deducting the customary commission as a compensation for their agency, and that they sold the same for $1,292.14, exclusive of such deduction. The second count was of a similar nature. The third alleged that the defendants, in consideration that the plaintiffs would deliver to the defendants divers goods to be by them sold for a reasonable reward, promised to sell the same and to guarantee to the plaintiffs the price for which the same should be sold, deducting the reasonable reward, in a reasonable time after such sale, and that the plaintiffs had delivered the goods to the defendants and the defendants had sold the same for $1,292.14, but had not guaranteed nor paid to the plaintiffs the price, deducting the reward, although a reasonable time had elapsed since the sale and although a special demand had been made upon them.

The defendants objected to the reception of these new counts as amendments, for the reason that they were for causes of action different and distinct from those contained in the original declaration; but the common pleas permitted them to be filed as amendments, to which the defendants excepted.

When the cause came on for trial in this court, before Morton, J., the defendants moved that the new counts might be struck out, as having been improperly admitted in the court below; but the judge directed the trial to proceed, reserving the question as to the new counts for the consideration of the whole court.

It appeared in evidence that the plaintiffs, who lived in this county, consigned to the defendants, at New York, the goods mentioned in the new counts, to sell on commission; that the defendants made sales of the same and stated an account with the plaintiffs, and paid over to the plaintiffs all the money they had actually received for such sales, but that some of the purchasers had failed, so that payment had not and probably could not be obtained of them. The defendants took a promissory note on time, of one or more of the purchasers, to whom they had sold a part of the goods, and another part they sold to one Rust on a credit of six months without taking any note or other security from him.

The plaintiffs then offered the testimony of witnesses to prove that, at the time when the defendants received the goods for sale, they agreed verbally to guarantee the sales. The defendants objected to the admission of this evidence, as being intended to prove a contract to pay the debt of another, which can only be proved by writing. But the objection was overruled, and the evidence went to the jury, who thereupon returned a verdict for the plaintiffs for the amount of the sums which the purchasers had failed to pay, deducting the commission.

No evidence was offered by the plaintiffs, either in the common pleas

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or in this court, respecting any claim upon the defendants, except under the guarantee set forth in one of the new counts.

The defendants moved for a new trial.

The opinion of the court was afterwards delivered by

PARKER, C. J. In this case, it is stated in the report that the plaintiff offered the testimony of witnesses on the stand to prove that, at the time when the defendants received the goods for sale, they agreed verbally to guarantee the sales. This evidence was objected to, on the ground that by the statute of frauds a contract of guarantee, to be binding, must be in writing, and that parol evidence to prove it was not admissible.

Now this depends upon the question whether the undertaking of the defendants to guarantee the sales was original or collateral. The defendants were commission merchants, and as such they received the goods for sale in the way of their business. The evidence went to prove that, when they received the goods, they guaranteed the sales; for this they had their commission, and, in the mercantile language, it was a del credere commission.

The legal effect of such a contract is to make them liable at all events for the proceeds of the sale, so that according to some of the authorities, though denied by others, they may be charged on indebitatus assumpsit, or for goods sold to them. And there seems to be no reason why they should not be so charged, if upon receiving the goods they became accountable, except that their liability is not fixed until a sale is made, and, if upon credit, not until the time of payment arrives, the goods, too, being at the risk of the vendors, with ordinary care on the part of the factors until the sale. But as the action cannot be sustained until after the sale has taken place, and then there is no legal excuse for not paying, the form of the action does not seem very material. Such is the nature of a commission del credere, as stated in 3 Chitty on Com. and Manuf. 220, 221, and in Paley on Principal and Ag. 35. McKenzie v. Scott, 6 Bro. P. C. 280; Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, Id. 285. Some of the principles laid down in these books are questioned in Gall v. Comber, 7 Taunt. 559, and Peale v. Northcote, Id. 478; but it seems nowhere to be required that a guarantee of this nature should be in writing, for the liability is admitted to be original, and although the vendor may in such case forbid payment to the agent if he is insolvent, and maintain an action for himself, which in other cases is held to be the distinctive mark of a collateral undertaking, yet in this particular contract such a privilege to the vendor is held not to alter the nature of his claim upon the factor.

We assume, from the terms of the report, that the evidence admitted proved such a contract as we have above described, and that the verdict of the jury was founded upon the fact so proved. But, on the supposition that the three original counts were not sustained by the evidence, we have considered the objection to the subsequent counts allowed to be

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filed on leave to amend. They set forth, in different forms, the contract as proved, viz., a promise to guarantee the sales of the goods. This does not appear to us to be a different cause of action from that set forth in the first series of counts. They are attempted to be charged for the same goods, in all the different forms, and in all as originally liable for them. The counts are consistent and for the same cause; the variation is only in the form of liability. It is like the case of Ball v. Claflin, 5 Pick. 303, 16 Am. Dec. 407.

Judgment according to verdict.[19]

BAXTER v. JACKSON.

(Court of King's Bench, Hilary Term, 1663. 1 Keb. 669.)

In Action upon the Case against the Defendant on promise quod warrantizaret pecuniam due by J. S. in consideration that the plaintiff would carry beer to the House of the Defendant. * * *

Judgment for the plaintiff.[20]

BUCKLY v. TURNER.

(Court of King's Bench, Hilary Term, 1671. 1 Mod. 43, Case 97.)

Action upon the case upon a promise. The case was, That Edward Turner, brother to the defendant, was indebted to the plaintiff for a quarter's rent; and the defendant in Consideration that the plaintiff mitteret prosequi prædict. Edwardum Turner (so the words are in the declaration) promised to pay the money.

After a verdict for the plaintiff it was moved in arrest of judgment, that here is not any consideration; for there is no loss to the plaintiff in sending to prosecute, &c. nor any benefit, but a disadvantage to the party that owed the money: besides, there is an uncertainty whether, or to whom, he should send.

TWISDEN. Mittere prosequi is well enough; for the plaintiff must be at charge in it.

KELYNGE, Chief Justice. Certainly it ought to have been omitteret; and if it be so in the Office-book we will mend it.

TWISDEN, Justice. This being after a verdict, if you mend it, they must have a new trial; for then it becomes another promise.

Jones moved for judgment, and said he found the word mitto did signify to send, forbear, Cease, or let alone; as mitte me quæso, "I pray let me alone," in Terence and in the Latin and English dictionary it hath the Sense of forbearing.

[19] The arguments of counsel are omitted.
Accord: Wolff v. Koppel, 5 Hill (N. Y.) 458 (1843).

[20] The case has been abridged.

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KELYNGE, Chief Justice. I think the consideration not good, unless the word mitto will admit of that sense: if it have a propriety of sense to signify, forbear, in reference to things as well as persons, it will be well.

Whereupon the dictionary being brought, it was found to bear that sense. And TWISDEN, Justice, said: If a word will bear divers senses, the best ought to be taken after a verdict.

PER CURIAM. Let the plaintiff take his judgment.

KING v. WILSON.

(Court of King's Bench. Trinity Term, 1730. 2 Strange, 873.)

RAYMOND, C. J., held that a parol promise to pay the debt of another in consideration of forbearance, was void by the statute of frauds and perjuries.[21]

WILLIAMS v. LEPER.

(Court of King's Bench, Easter Term, 1766. 3 Burr. 1886.)

One Taylor, a tenant to the plaintiff, being three-quarters of a year (which amounted to £45.) in arrears for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed Leper, the defendant, as a broker, to sell the effects: and accordingly, he advertised a sale. On the morning advertised for the sale, Williams the landlord came to distrain the goods in the house. Leper having notice of the plaintiff's intention to distrain them, promised to pay the said

[21] Accord: Durham v. Arledge, 1 Strob. (S. C.) 5, 47 Am. Dec. 544 (1846).

The decision of Jordan's Case, Y. B. 27 Hen. VIII, fol. 24, pl. 3 (1535), ante, p. 12, is shown by Judge Hare to have been necessary to afford a remedy in assumpsit against the parol guarantor (Hare on Contracts, pp. 122, 133), who could not be held liable in debt.

See Y. B. 9 Hen. V, fol. 14, pl. 23, ante, p. 113.

The doctrine of Jordan's Case, that forbearance in any form could not create a debt, has remained the law of England to the latest day. In no form has forbearance ever been held to be the quid pro quo of a debt, and the only writ successfully employed has been the action on the case on the contract of assumpsit. Rogers v. Snow, Dalison, 94 (15 Eliz.).

Some of the innumerable illustrations of forbearance promises, where the action on the case upon the assumpsit was successfully maintained, are the following:

Forbearance until Michaelmas gave rise to an assumpsit in Thornton v. Kemp, Gouldsborough, 146 (Hilary Term, 43 Eliz.). A stay of execution against a third person on request of the defendant gave rise to an assumpsit in Jennings v. Hatley, Yelverton, 19 (44 & 45 Eliz.).

An agreement by a pawnee not to sell the goods of his debtor for three days upon the defendant's promise to pay the debt. Capper v. Dickingson, 1 Rolle Rep. 215 (13 Jac. 1).

Thus a discharge of a debtor from imprisonment on request gave rise to an action on the case in Atkinson v. Settree, Willes' Reports, 482 (1744).

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arrear of rent, if he would desist from distraining: and he did thereupon desist.

At the trial, a verdict was found for the plaintiff, for £45.

The question was whether the verdict should be entered up for £45. or for a smaller sum (£7. 5s.); the promise not having been reduced to writing.[22]

Lord MANSFIELD. The evidence went further than the declaration states. The declaration does not state whether the promise was in writing or not; the evidence shows it was not. But both are consistent.

This case has nothing to do with the statute of frauds.

The res gestæ would entitle the plaintiff to his action against the defendant.

The landlord had a legal pledge. He enters, to distrain; he has the pledge in his custody. The defendant agrees "that the goods shall be sold, and the plaintiff paid in the first place." The goods are the fund; the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds. It is rather a fraud in the defendant, to detain the £45. from the plaintiff, who had an original lien upon the goods.

Mr. Justice WILMOT thought this case out of the statute of frauds. This is not a collateral promise to pay the debt of another.

The case of Read v. Nash, 1 Willson, 305, does not clash with the other determinations on the statute of frauds. That was an original undertaking; the debtor was never liable for that particular sum of £50.

But this case is not within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is in possession of the goods; having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise, in order to discharge the goods of this distress. I consider this distress as being actually made. Leper says, "If you will quit the goods and disincumber the fund, I will pay you."

Leper became the bailiff of the landlord; and when he had sold the goods, the money was the landlord's (as far as £45.) in his own bailiff's hands. Therefore an action would have lain against Leper for money had and received to the plaintiff's use.

Mr. Justice YATES. It was not necessary to state in the declaration, "That the promise was in writing."

This declaration states a promise "to pay the arrear of rent amounting to £45." (a specific sum). The defendant was in possession of the

[22] The argument of counsel is omitted.

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goods, and about to sell them. The plaintiff entered, with intent to distrain them for £45. The defendant says, "Let me go on to sell them; and I will pay you the £45." He undertook to pay this, in all events, peremptorily and absolutely. This is an original consideration to the defendant.

Therefore he concurred in being of opinion for the plaintiff; and that the verdict should be entered for the sum of £45.

Mr. Justice ASTON. If this was a promise to pay the debt of Taylor, I should think it within the statute, upon Sir Fletcher Norton's distinctions, which are the true ones.

But I look upon the goods here to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for £45.

The goods were a fund between both; and on that foot, I concur.

But otherwise, I should have thought (with Sir Fletcher) "that the case of Read v. Nash does not clash with the other determinations about collateral promises."

Postea to be delivered to the plaintiff: and the verdict to stand for the whole £45.[28]

HOULDITCH v. MILNE.

(Court of King's Bench, at Nisi Prius, Hilary Term, 1800. 3 Esp. 86.)

Assumpsit for the repair of carriages.

The case in evidence was that the carriages belonged to a Mr. Copey; that the defendant had sent them to the plaintiffs to be repaired, and had given orders respecting them.

One of the carriages had been bought by Mr. Copey himself, and paid for by him; and the bill which was the object of the present action contained a charge for repairs done to this carriage, and was made out in the name of Copey.

When the carriages were repaired, the defendant sent an order to pack them up, and send them on board ship. The plaintiffs upon this

[28] Accord: Clymer v. De Young, 54 Pa. 118 (1867); Hale v. Boardman, 27 Barb. (N. Y.) 82 (1858); Blackford v. Plainfield Co., 43 N. J. Law, 438 (1881). See Fennel v. Mulcahy, 8 Ir. Law Rep. 434 (1845), where the distress was given back to the tenant and not to the defendant. The Irish Exchequer of Pleas held that the defendant's promise was within the statute of frauds. The opinion of Brady, C. B., contains this suggestive language: "He did not become a trustee or bailiff for the plaintiff. No goods were left in his hands." The subsequent English decisions are presented and discussed by the editor in "A New and Old Reading on the Fourth Section of the Statute of Frauds," University of Pennsylvania Law Review, and American Law Register, vol. 57, pp. 611-634 (1909). The position taken is that the statute of frauds did not apply to the action of account, and wherever, therefore, the circumstances render the defendant (upon the transfer to him of property) liable to an action of account, the defendant's promise to account for the disposition of property so transferred is not within the statute, although this promised application of the property may extinguish the debt of a third person.

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sent to him to know who was to pay for them. The defendant said he had sent them, and he would pay for them.

In consequence of this, the carriages were packed up and sent on board ship, and the bill was made out and delivered to the defendant. He desired time to look over it; and when the plaintiff's clerk called a second time, he said the charges appeared very high, but desired the clerk to call in a very few days, and he would settle it. Not having done so, Mr. Phillipson, the plaintiff's attorney, waited upon him, when he said he was told the bill was a most exorbitant one, and a fit subject to refer. He, however, said he had the money to pay it, but did not say whether his own or Mr. Copey's.

Upon this, Best, Serjeant, for the defendant, contended that, there being no proof of the defendant's having money of Mr. Copey's in his hands to apply to the count in the declaration for money had and received, the plaintiff must be non-suited, and said it came exactly within the principle of Matson v. Wharam, 2 Term Rep. 80, in which it was decided that, if the person who had the goods was at all liable, the undertaking of another must be in writing. The question therefore was, Was Mr. Copey himself liable to the plaintiffs? If so the present action could not be supported.

He contended that this must be taken to be the fact, as the bill sent to the defendant was made out in Copey's name, and contained charges for work done by Copey's own order; that everything done by the defendant was done in his character of agent to Mr. Copey, and there being no note in writing, he was not personally liable.

Lord ELDON said he was not disposed to non-suit the plaintiff. In general cases, to make a person liable for goods delivered to another, there must be either an original undertaking by him, so that the credit was given solely to him; or there must be a note in writing. There might, however, be cases where this rule did not apply. If a person got goods into his possession, on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary. It appeared to apply precisely to the present case. The plaintiffs had to a certain extent a lien upon the carriages, which they parted with on the defendant's promise to pay. That, he thought, took the case out of the statute, and made the defendant liable for the amount of the bill.

The plaintiffs had a verdict, subject to a reference with respect to the charges on the bill.

HUGHES v. LAWSON.

(Supreme Court of Arkansas, 1876. 31 Ark. 613.)

Appeal from Jefferson Circuit Court. Hon. J. A. Williams, Circuit Judge.

HARRISON, J. Lawson sued Hughes before a justice of the peace, upon his promise to pay the debt of one Hudson for $80.00. The

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plaintiff recovered judgment before the justice, and the defendant appealed to the circuit court, and in the circuit court the plaintiff again obtained a verdict and judgment. The defendant then appealed to this court.

The evidence was that Hudson owed the plaintiff $80 for the labor of his son in his crop, and being threatened by the plaintiff with a suit, they, at his suggestion, went to the defendant, whose land Hudson had cultivated, to get him to settle the debt. The defendant promised the plaintiff to pay the debt when Hudson's cotton, then in his gin, was sold. The defendant had furnished the land, and the team and feed for the same, and was to have one-half of the crop; and Hudson had agreed to turn over the cotton raised on the place to the defendant to secure advances he had made him, and a debt which he owed M. M. Dodd, and for which the defendant was bound.

After the defendant's promise, Hudson, without his consent or knowledge, carried the cotton to Pine Bluff and turned it over to Dodd in payment of his debt to him, and the defendant received no benefit whatever from it.

The court gave, at the instance of the plaintiff, the two following instructions to the jury, against the objection of the defendant:

"First. If you believe, from the evidence, that the defendant agreed to pay the plaintiff, for Hudson, $80, and had, at the time, money or property in his possession or under his control, or afterwards got any, out of which it was to be paid, you will find for the plaintiff.

"Second. If you believe, from the evidence, that the defendant promised, in the presence of the three parties, and it was so agreed and understood between them, to pay the plaintiff Hudson's debt to him, it became the debt of the defendant, and Hudson was discharged from his obligation to the plaintiff, and you will find for the plaintiff."

The rule is well settled that the mere possession of property belonging to the original debtor, not deposited with the defendant for the purpose of paying the debt will not withdraw his verbal promise to pay it from the operation of the statute of frauds. Browne, Stat. Frauds, § 187; Dilts v. Parke, 4 N. J. Law, 219; Simpson v. Nance, 1 Speers (S. C.) 4; State Bank v. Mettler, 2 Bosw. (N. Y.) 392.

The cotton in the defendant's gin at the time of his promise was not placed there for the purpose of paying the debt, and there was no evidence that any property afterwards came to his hands for that purpose. The case is, therefore, clearly within the rule just stated.

It is also as well settled that a promise by a third person to pay the pre-existing debt of another, having immediate respect to and founded upon the original liability, and without any new consideration moving him to pay or answer for such debt, is a collateral undertaking, and, unless in writing, within the prohibition of that statute. Kurtz v. Adams, 12 Ark. 174; Elder v. Warfield, 7 Har. & J. (Md.) 391; Tileston v. Nettleton, 6 Pick. (Mass.) 509; 2 Par. Con. 9; Browne, Stat. Frauds, § 212.

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There was no evidence of any new consideration moving to or inducing the defendant to assume the debt as his own, by which Hudson would have been discharged. No purpose of his own was shown to be subserved by his promise.

The second instruction was likewise erroneous.

The following instruction was asked by the defendant, which the court refused to give:

"If you find, from the evidence, that there was a pre-existing debt from the plaintiff to Hudson, and that the defendant promised to pay said debt, you will find for the defendant, unless it also shows that the promise was in writing, or that a new consideration was given by the plaintiff, which moved him to pay or answer for the debt."

The latter part of this instruction, or that in regard to a new consideration, is not accurately correct, for a consideration for the promise, from Hudson, would have been equally as availing; but as there was no evidence of any such consideration, it was entirely abstract and mere surplusage, and could not possibly have misled the jury.

With this exception, the instruction was but the declaration of the statute of frauds (Gantt's Dig. § 2951), and the court erred in refusing to give it to the jury. Kurtz v. Adams, supra.

The judgment of the court below is reversed, and the cause remanded to it, with instructions to grant the defendant a new trial.[24]

HARBURG INDIA RUBBER COMB CO. v. MARTIN.

(Court of Appeal, King's Bench Division. [1902] 1 K. B. 778.)

Appeal from a decision of Mathew, J.

The plaintiffs, a foreign company carrying on business in Germany, were judgment creditors of an English company called the Crowdus Accumulator Syndicate, Limited, of which the defendant was a director and in which he held a large number of shares. He had also financed the syndicate.

[24] Accord: Dilts v. Parke, 4 N. J. Law, 219 (1818); Frame v. August, 88 Ill. 424 (1878); Simpson v. Nance, 1 Speers (S. C.) 4 (1842).

Contra: Dock v. Boyd & Co., 93 Pa. 92 (1880), where the defendant was held upon his oral representation to the plaintiff that he had money or other property of the debtor in his hands, thereby inducing the plaintiff's forbearance by promising to sell the said property and pay the plaintiff.

The principal case follows in the line of the action of account. No action of account could lie unless the property was transferred to the defendant for the purpose of being disposed of by the defendant who thereupon agreed to render an account.

Similarly, the instructive case, Walther v. Merrell, 6 Mo. App. 370 (1878), decides that the transfer or bailment must be made to the defendant for the purpose of putting him in possession of property as to which he must account. Therefore a depositor in a bank cannot recover against its president on the latter's verbal guaranty of the deposit, in consideration of its non-withdrawal by the defendant. The case well exposes the fallacy that a new consideration takes the case out of the statute.

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The plaintiffs had issued a writ of fi. fa. upon the judgment, which the sheriff had failed to execute, because he could not effect an entry. The defendant then had an interview with a Mr. Winter, the plaintiffs' agent in England, at which he verbally promised Winter that he would indorse two bills of exchange, each for half the amount of the debt, and payable respectively at three and six months. On the faith of this promise Winter withdrew the writ. The action was brought for breach of the defendant's promise.

At the trial Mathew, J., gave judgment for the plaintiffs, holding that section 4 of the statute of frauds did not apply.

In the course of his judgment the learned judge said: "What is the result of the evidence? At the time when the defendant came to Mr. Winter the plaintiffs were in a position to take possession of the goods of the syndicate. They were in a position analogous to that of persons having possession of the goods, and their legal position is recognized in Williams v. Leper (1766) 3 Burr. 1887, and in Edwards v. Kelly (1817) 6 M. & S. 204, 18 R. R. 349. Those cases have been discussed with approval, and very sensible and reasonable cases they are, and in their facts they closely approach the present case. They are discussed in the notes to Forth v. Stanton, 1 Williams' Saund. 209a. What was the object of the arrangement here? The object was to protect the goods of the syndicate; it was not to pay the debt of another. It is pretty clear that what the defendant suggested was that he should have time to sell all which belonged to the company. If, in fact, the object of the contract was to protect the goods, that would be sufficient to take the case out of the statute.

"But there is another point still more clearly in favor of the plaintiffs, namely, that the promise was given for the purpose of obtaining a direct personal advantage for the defendant himself. He had invested a large sum in the syndicate, and would lose every farthing of it unless time were given for the syndicate to get on its legs. With that object—and I should gather it was the sole object he had in view—he made the promise. That again is a ground for saying that the case is not within the statute of frauds, as is clear from Sutton & Co. v. Grey, [1894] 1 Q. B. 285.

"Under these circumstances it seems to me clear that the statute of frauds does not apply, and my judgment must be for the plaintiffs."

The defendant appealed.[25]

VAUGHAN WILLIAMS, L. J. The material facts of this case are very short. The plaintiffs had supplied goods to a company called the Crowdus Accumulator Syndicate. The syndicate did not pay what was due from them for the goods, and the plaintiffs recovered judgment against them, and placed a writ of fi. fa. in the hands of the sheriff to realize the amount of their judgment. The sheriff found that the works of the syndicate had been stopped and their place of business

[25] The argument of counsel is omitted.

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closed, and he did not take possession. After this there was a meeting between the defendant and Mr. Winter, the plaintiffs' agent. A conversation took place at that meeting, and the jury have found that Mr. Winter's account of it is accurate. To put the result of the conversation shortly, the defendant then verbally promised Mr. Winter that he would indorse some bills for the amount of the judgment debt. It is said that amounted to an oral promise to give a guarantee of the judgment debt owing by the syndicate to the plaintiffs.

It is said on behalf of the defendant that this was a promise by him by word of mouth to make himself answerable for the debt of the syndicate. It is said on behalf of the plaintiffs that this was not a promise to make himself answerable for the debt of another—that is, the syndicate—but that it was a contract of indemnity, by which, I suppose, is meant a new contract in the nature of an original obligation.

The question which we have to decide is whether this bargain is "a promise to answer for the debt of another" within section 4 of the statute of frauds. Mathew, J., has held that it is not. I am sorry to say that I cannot agree with that conclusion. It seems to me that this contract was as plainly as possible a promise by the defendant to make himself answerable for the debt of the syndicate.

Our attention has been called to a great number of cases in which the court has treated various transactions as being outside section 4. Most of the earlier cases were what I may call "property cases." They were cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire. It is not necessary for me to go through those cases, but I cannot agree that the present case comes within any of that class. The defendant's promise was not, as it seems to me, either a new contract of purchase, or a new contract for the release of any property which either was his or in which he had an interest.

Our attention was next called to the exception which has been established by what I may call the "del credere cases," beginning with Couturier v. Hastie, 8 Ex. 40, and coming down to Sutton & Co. v. Grey, [1894] 1 Q. B. 285. It has been said, and I think truly, that these cases are of a different species from the property cases. I say of a different species, not of a different genus, because I think there is a wider genus, which can be plainly and simply defined, within which both of these species fall. So far as I can see, the authorities have left us with a general rule, which I will attempt to define presently, and each of these two classes of cases falls within that general rule. In each of them, I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but, whether he does so or not, it is the substance, not the form, which is regarded.

Before leaving these instances I wish to mention one other class, which I do not treat as an exception from section 4, but which, I think, does not come within the section at all. I mean the cases which

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have been spoken of as "indemnity cases." Of course in one sense all guarantees, whether they come within section 4 or not, are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly thus expressed in the notes to Forth v. Stanton, Williams' Notes to Saunders (Ed. 1871) vol. 1, p. 234: "These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable."

That, to my mind, is an accurate definition of a guarantee or indemnity which comes within section 4 of the statute, as distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the course of the argument a contract of indemnity. I will not go through these cases at length, but it seems to me that Guild & Co. v. Conrad, [1894] 2 Q. B. 885, entirely confirms this as being the true view of the distinction between an indemnity and a guarantee which comes within section 4. That case was decided by Lindley, Lopes, and Davey, L. JJ. There the defendant had orally promised the plaintiff that if he would accept certain bills for a firm in which the defendant's son was a partner, the defendant would provide the plaintiff with funds to meet the bills, and it was held (affirming the judgment of Mathew, J.) "that this was a promise of indemnity and not of guarantee, and therefore not required by section 4 of the statute of frauds to be in writing." Lindley, L. J., in the course of his judgment said ([1894] 2 Q. B., at page 892): "The authorities are Thomas v. Cook (1828) 8 B. & C. 728; 32 R. R. 520, and Wildes v. Dudlow (1874) L. R. 19 Eq. 198. Thomas v. Cook appears to me to be undistinguishable from this case if the facts here are such as I take them to be." Then the Lord Justice cited the following passage from the judgment of Parke, J., in Thomas v. Cook: "This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same." And Davey, L. J., said ([1894] 2 Q. B., at page 896): "In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not."

It seems to me that those judgments entirely confirm the view which is taken in the note to Forth v. Stanton, Williams' Notes to Saunders (Ed. 1871) vol. 1, p. 234, which I have read.

In my judgment, the circumstances of the present case show plainly that there was a guaranty of the payment of a debt for which the syndicate was primarily liable, and not an original promise by the de-

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fendant to keep the plaintiffs indemnified. In my judgment, a contract of indemnity does not come within section 4, but I think there is nothing to justify us in holding that in the present case the contract is a contract of indemnity. In my opinion, it is a contract of guaranty —"a promise to answer for the debt of another."

I will now go back to those cases which, so far as the words of the contract are concerned, might come within section 4, but which have been held not to come within it because of the object of the contract. Whether you look at the "property cases" or at the "del credere cases," it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of those cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases, it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property—the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both "property cases" and "del credere cases."

Can we then in the present case find any larger contract? I cannot. It seems to me plain upon the evidence that the only matter which was present to the mind of the defendant, and was presented by him to Mr. Winter, was this: "Will you forbear for a time? Will you give the syndicate, which I believe has a future before it, an opportunity of turning round? I believe that if it has that opportunity, it will do well and will be able to pay you. And to induce you thus to forbear I will give you bills which shall secure the payment at specified periods of the judgment debt, in case the syndicate does not pay you itself." That, I think, is the true effect of the conversation, and it seems to me that was the whole of the contract, and there was neither a purchase nor a del credere arrangement, nor anything else beyond that bargain. And the mere fact that the defendant had, as he seems to have done, financed the syndicate to a large extent, and that that was his motive for thus coming forward and bargaining for forbearance, cannot make any difference in the object of the contract. That might have been the motive which induced him to make himself answerable for the debt of the syndicate, but it was not the object of the contract. The object

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was simply to obtain the forbearance of the creditors in respect of the debt.

It was suggested that the true definition of cases which do not come within section 4 should be, not those in which the obligation to pay the debt of another is an incident of a larger contract, but those in which the main object is to secure the promisor's own personal interest. But, I think, if such a definition were adopted, there would be nothing left to come within section 4, because in every case there must be a consideration for which the promisor bargains to come to him from the promisee. That is as true of mere forbearance as of anything else. If the contract is that the promisor will be answerable for the debt due to the promisee if he will forbear, if the main object is to obtain that forbearance, and the promisor wishes to obtain it, that would be sufficient to take the case out of the statute. In my opinion so to hold would be simply to repeal section 4.

I wish to say a word about Fitzgerald v. Dressler, 7 C. B. (N. S.) 374, which was decided long after Couturier v. Hastie, 8 Ex. 40. In his judgment in Fitzgerald v. Dressler, Cockburn, C. J., quoted the note to Forth v. Stanton, 1 Wms. Saund. 211e, and expressly approved of it, subject to one qualification. The passage which he quoted was this: "The fair result seems to be that the question, whether each particular case comes within this clause of the statute (section 4) or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." The learned judge added: "I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property, it being, as I think, truly stated there, as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as, where the property, in consideration of the giving up of which the party enters into the undertaking, is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."

I wish to point out that Cockburn, C. J., was there in terms dealing only with the "property cases" as an instance—and I think it is clear that he intended to deal with them only as an instance—of a general

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rule. I have attempted to define that general rule, and, I think, that every one of the exceptions which is to be found in the decided cases comes within the rule, as I have defined it.

In my opinion the judgment of Mathew, J., should be reversed, and the appeal allowed.

I have said nothing about the question of damages because, in the view which we take, it does not arise.

STIRLING, L. J. I am of the same opinion. But, as the case is one of difficulty, and we are differing from Mathew, J., and we have heard a most excellent and elaborate argument, I will add a few words of my own, though I agree entirely with what has been said by Vaughan Williams, L. J.

In my opinion the decision in Guild & Co. v. Conrad, [1894] 2 Q. B. 885, does not apply. It is, I think, impossible to arrive at the conclusion at which the learned judges arrived in that case, namely, that the defendant's contract was to pay the debt whether the syndicate, of which he was a director, could or could not pay it. In Guild & Co. v. Conrad it was found that the contract was not to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay, but the contract was to provide funds to enable the plaintiffs to meet certain acceptances. In the present case it seems to me that the transaction in contemplation was to give time to the syndicate in the expectation that in the interval they would be placed in funds by which they would be enabled to pay all their debts. The important element corresponding to that which existed in Guild & Co. v. Conrad, namely, the absence of any expectation that the syndicate would ever be able to pay, is here wanting.

That being so, we have to consider whether the contract was "to answer for the debt, default, or miscarriage of another person" within the meaning of section 4 of the statute of frauds. Undoubtedly the decisions run fine in these cases, and the main stress of the argument has been an attempt to extend the doctrine laid down in Couturier v. Hastie, 8 Ex. 40, and Sutton & Co. v. Grey, [1894] 1 Q. B. 285, to the present case, though reliance was also placed on some earlier authorities with which I will first deal. I accept the passage which has been read from the judgment of Cockburn, C. J., in Fitzgerald v. Dressler, 7 C. B. (N. S.) 374, as stating accurately the law with reference to two classes of cases, of which Williams v. Leper, 3 Burr. 1887, and Walker v. Taylor, 6 C. & P. 752, are the types. I do not forget that in Williams v. Leper a promise to pay rent was given by an auctioneer who had possession of property under instructions from the real owner to sell it; but, when the reasons assigned by the learned judges for their decision are examined, it appears to me that the auctioneer was treated by them as the agent of the owner, and as having authority from him to enter into a contract to pay the rent out of the proceeds of the sale. The promise must be taken to have been that of the owner,

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and, therefore, the case is brought within the statement of the law to which I have just referred.

Again, in Walker v. Taylor it seems to me that the transaction really was a purchase by the defendant of a right of the plaintiff, which the defendant thought would be valuable to him. Having acquired the right he refused to pay, and it was held that the case did not fall within the statute.

I come then to Couturier v. Hastie, in which it was held that a contract by a del credere agent was not within the statute. From the judgment of Bowen, L. J., in Sutton & Co. v. Grey, 69 L. T. (N. S.) 354, 355, it is clear that he regarded Couturier v. Hastie as going to the very verge of the law, and he referred to the observations upon it made by Page Wood, V. C., in Wickham v. Wickham (1855) 2 K. & J. 478, at page 487. In Sutton & Co. v. Grey, [1894] 1 Q. B. 285, there was a contract between a firm of brokers and the defendant of which the terms were that he should introduce clients to them, and that the plaintiffs should transact business on the Stock Exchange for the clients thus introduced, and that as between the plaintiffs and the defendant, he should have half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by him, and he should pay to the plaintiffs half of any loss which might be incurred by them in respect of those transactions. The plaintiffs claimed to recover from the defendant half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of a person who had been introduced to them by the defendant, and it was held that, the defendant having an interest in the transactions equally with the plaintiffs, the principle of Couturier v. Hastie applied. Lord Esher, M. R. ([1894] 1 Q. B. 285, at page 289), cited the above quoted passage from Fitzgerald v. Dressler, 7 C. B. (N. S.) 374, and commented on it thus: "The learned judge there used the words 'has himself no interest in the property which is the subject of the undertaking' because he was dealing with a case of property; but if his words be read, as I think they should be, 'has no interest in the transaction,' he is adopting that interpretation of Couturier v. Hastie which I think is the right one." It is upon this passage in the judgment of Lord Esher that the argument for the plaintiffs in the present case has been really founded. But, as it seems to me, both in the judgment of Cockburn, C. J., in Fitzgerald v. Dressler, and in the judgment of Lord Esher, M. R., in Sutton & Co. v. Grey, [1894] 1 Q. B. 285, the word "interest" means some species of interest which the law recognizes. In the present case the defendant had no such interest in the property which was about to be seized by the sheriff. He was a director of the syndicate who had, no doubt, a deep interest, in the popular sense of the word, in its proceedings. He held a large number of shares. I believe he was the largest shareholder in the syndicate. He had also financed the syndicate, but he

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had nothing in the nature of a charge on their property. He was at the utmost a general creditor of the syndicate.

It has been contended that we ought to read the words "interest in the transaction" in a wide sense, and as importing a "business interest" in the syndicate—that kind of interest which a creditor and a shareholder of a company has in its prospects. To do this would, I think, go a long way to repeal section 4 of the statute of frauds, and to extend the doctrine of Couturier v. Hastie, 8 Ex. 40, very much further than I am prepared to extend it.

For these reasons I think that the appeal ought to be allowed, and the judgment of Mathew, J., reversed.

COZENS-HARDY, L. J. I agree. It seems to me, for the reasons which my Lord has given and which I will not repeat, that this was certainly not a contract of indemnity. Prima facie the contract falls within section 4 of the statute, unless it can be brought within some recognized or some logical exception. One great peculiarity is this, that neither the plaintiffs nor the defendant had possession of or had any interest in the goods of the syndicate. But it has been forcibly and most ably argued that the case is brought within the recognized exceptions from the section, because the defendant, though he had no legal right to or interest in the goods, yet had in a business sense an interest in them. It has been argued that we ought to look at the object of the promise which the defendant made, and that if we can come to the conclusion that his object in giving the promise was to secure a benefit for himself, and not to secure forbearance for the syndicate, then we ought to hold that the case is not within the statute at all. I cannot agree with that argument. It seems to me to involve a confusion between object and motive. I cannot doubt that the object of the promise which was made by the defendant was to secure the forbearance of the plaintiffs, for three months and six months, in enforcing the debt due from the syndicate.

If that be so, the authorities do not, as it seems to me, in any way support Mr. Russell's contention. They have been divided conveniently into three classes. The first consists of what have been called "the property cases." I do not think they can be dealt with more accurately, and certainly not more shortly, than they were by Williams, J., in his judgment in Fitzgerald v. Dressler, 7 C. B. (N. S.), at page 394, where he said: "At the time the promise was made the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute." And he referred to Williams v. Leper, 3 Burr. 1887, Castling v. Aubert, 2 East, 325, and Anstey v. Marsden (1804) 1 B. & P. (N. R.) 124, 8 R. R. 713.

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Then stress has been laid on what have been called "the document cases." Those cases seem to me to stand on an entirely different footing. If I go to a banker or to another person who holds documents as security for a debt, and I ask him to hand over the documents to me on payment of the debt, that is simply a purchase of the security. Although in this way I have become answerable for the debt of another, that is not the main object of the contract.

The third class consists of those cases which have been called "the del credere cases." When they are fairly regarded, they seem to me to amount only to this: That a contract, e. g., for the employment of a del credere agent, need not be in writing, although it incidentally involves the answering for a debt of another person. In other words, if the court can find that there is a main contract, the object of which is not to answer for the debt of another, that contract is not within section 4, even though incidentally it may result in a liability to answer for the debt of another.

For these reasons I agree with the Lord Justices, and think that the appeal ought to be allowed.

Appeal allowed.

WHITE v. RINTOUL.

(Court of Appeals of New York, 1887. 108 N. Y. 222, 15 N. E. 318.)

Appeal from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made January 7, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was brought upon an alleged verbal promise of defendant to pay the amount of two notes owned by plaintiff and made by the firm of Wheatcroft & Rintoul.

The material facts are stated in the opinion.[26]

FINCH, J. The doctrine prevailing in this state which serves to distinguish between original and collateral promises in cases arising under the statute of frauds has been reached in three stages. Each was a definite and deliberate advance toward a more faithful observance of the statute, and an abandonment of efforts to narrow the just and natural range of its application. When, by some authorities, it was said that a verbal promise to pay the debt of another was always collateral, and invalid if the primary debt continued to exist concurrently with the promise, a simple and easy test was furnished to determine whether the statute did or did not apply. But when that test was discarded, and it became the law that a promise to pay another's debt might be original, although that debt subsisted and was in no manner extinguished, the presence of such continued liability raised a cloud of doubt and ambiguity, which perhaps will never be entirely dissipated.

[26] The arguments of counsel are omitted.

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The argument in the present case has so reached back to the foundations of the controversy, and challenged or construed what has been said and ruled, as to make both useful and necessary a study of the path which the courts of this state have followed. The plaintiff has recovered upon a verbal promise to pay the debt of another, and seeks to maintain his position in part upon the definition of an original promise framed in the old and familiar case of Leonard v. Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317. That definition assumed as the test of an original promise that it was founded on a new or further consideration of benefit or harm moving between the promisor and promisee. There was found in this some inaccuracy of expression. For since every promise must have some consideration to be valid at common law, and that necessary and inevitable consideration, wherever the debt to be paid antecedently existed, is always "new" and "further," because different from that of the primary debt, and since, also, such new consideration does frequently move between the newly contracting parties, giving benefit to promisor or harm to promisee, it became apparent that the terms of the definition were dangerously broad and capable of a grave misapprehension, making it almost possible to say that a promise good at common law between the new parties was good also in spite of the statute.

This difficulty was disclosed and measured, and then remedied in Mallory v. Gillett, 21 N. Y. 412, by a divided court, it is true, but upon a prevailing opinion so strong in its reasoning and so clear in its analysis as to have commanded very general approval. The case was one where, in reliance on the promise made, the promisee had released to his debtor a lien which gave his debt protection. Within the language of the rule in Leonard v. Vredenburgh the promise was original and not within the statute, since the consideration which supported it was "new" and "further" and passed between the newly contracting parties, and consisted in the harm to the promisee involved in the surrender of his lien. But the promise was nevertheless held to be collateral, and the earlier definition modified, so as to require that the new consideration should move to the promisor and be beneficial to him. This change shut out at once from the class of original promises all those in which the consideration of the promise was harm to the promisee, and the resultant benefit moved to the debtor, instead of the promisor. The ground of the doctrine thus asserted was explained by the test then prevailing in Massachusetts, declaring the promise original where its leading and chief object is to subserve or promote some interest or purpose of the promisor himself, and upon which the respondent very much relies. Nelson v. Boynton, 3 Metc. 396, 37 Am. Dec. 148. That this expression was understood to mean, not merely some moral or sentimental object, but to relate to a legal interest or purpose tangible by the law and a product of the consideration received from creditor or debtor, is apparent from the further current of the explanation. The learned judge contrasts a case in which

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the consideration benefits the debtor, but in it the promisor has no personal interest or concern, with one in which the consideration is the product of some new dealing between creditor or debtor and promisor, and in which the latter has a personal interest. That is what he means by a consideration of benefit moving to the promisor, and to obtain which is the object of the promise. But the rule thus stated and explained was again narrowed and restricted. In Brown v. Weber, 38 N. Y. 187, it was asserted that a promise might still be collateral, even though the new consideration moved to the promisor and was beneficial to him. It was distinctly said that the existence of those facts would not in every case stamp the promise as original, but the inquiry would remain whether such promise was independent of the original debt or contingent upon it. The court added: "The test to be applied to every case is whether the party sought to be charged is the principal debtor primarily liable, or whether he is only liable in case of the default of a third person, in other words whether he is the debtor, or whether his relation to the creditor is that of surety for the performance by some other person of the obligation of the latter to the creditor."

If this statement was not needed for a determination of the case, or the generality of its language left it debatable what precise limitation or qualification was intended to be added to the rule of Mallory v. Gillett, both difficulties were removed by the recent case of Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693, in which Rapallo, J., states with precision and accuracy the doctrine of the court. The debt there was the debt of one Silliman, and the verbal undertakings were held to be within the statute, unless the defendant, before making the promise, had so dealt as to make Silliman's debt his own, or had incurred a duty to pay the amount owing from Silliman to the plaintiff. It was added, relatively to one possible view of the facts, that the plaintiff's undertaking was to pay out of the proceeds of the stock, and his duty to pay would not arise until he had converted the stock into money. "Consequently," it was concluded, "at the time of the alleged promise he was under no present duty to pay and the promise, though founded on a good consideration (viz., the adjournment of the sale), was nevertheless an undertaking to pay the debt of another."

These four cases, advancing by three distinct stages in a common direction, have ended in establishing a doctrine in the courts of this state which may be stated with approximate accuracy thus: That where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.

The question in the present case was raised in three ways. At the first effort to prove a verbal promise to pay the debt due plaintiff, the objection was made to the evidence that if any promise was to be proved

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it must be in writing. The objection was overruled and an exception was taken. After the conversation had been stated, which culminated in a promise, the defendant moved to strike out that part of the answer which detailed the verbal promise. That motion was denied and the defendant again excepted. At the close of the plaintiff's case there was a motion for a non-suit upon the ground that the promise was not in writing and was, therefore, within the statute of frauds, and also upon the ground that there was no evidence that the promise was for the promisor's special benefit. The motion was denied, and again an exception was taken. Finally, at the close of the evidence, the court was asked to direct a verdict for the defendant, which was refused and the defendant excepted. I do not think that any of these exceptions were waived by the defendant's subsequent request to charge. The case went to the jury against his objection and upon a theory to which he in no manner assented; but, even upon that theory, to which the court drove him, he had a right to claim that he was not liable, and ask a charge which might give him protection without at all waiving his position upon the law.

We are, therefore, to bring the facts of the case to the test of the rule above stated, and in doing so, we are to take them from defendant's own lips, to treat as true his representations as detailed by his adversary, and to draw from the evidence every possible inference which is favorable to the plaintiff's case. The firm of Wheatcroft & Rintoul, of which defendant was not a member, became indebted to the plaintiff in the amount of two notes, one dated June 1, 1880, and maturing September 4, 1880, and the other dated July 1, 1880, and to become due October 4, 1880. On the 16th of August, 1880, and so before the maturity of either note, the defendant requested the plaintiff to forbear any effort at their collection until June or July, 1881, promising, if the plaintiff would do so, to pay the amount of the notes. The plaintiff did forbear, and now sues upon the promise. The courts have held many times that a promise upon consideration of forbearance to sue the debtor is not original, and to be valid must be in writing.

In Ackley v. Parmenter, supra, it was said, "forbearance or indulgence to the debtor, even at the request of the promisor, will not support a verbal promise by a third party to pay the debt." If there were nothing more of the case than has been thus far stated, it would be very clear that the plaintiff ought to have been non-suited. But there are further facts upon which it was found that the sole object of the defendant was to subserve some purpose of his own. I do not recognize that as either a test or a rule. "Some purpose" might mean one of morals or sentiment, of gratitude or pride, and to subserve such purpose might be the sole object of the promise, and then by submitting the question to the jury, it would be easy in every case to defeat and evade the statute. But neither the court below nor the plaintiff's counsel meant so lose a doctrine. What they did mean was that on the facts it was possible to say that the forbearance of the plaintiff to

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sue was not merely a benefit to Wheatcroft & Rintoul, but that defendant was so situated, relatively to that firm, that the plaintiff's delay was a benefit to the defendant personally, which he contracted for in his own interest, and obtained by means of his promise.

One member of the debtor firm was the defendant's son, and that firm was somewhat in debt and not managing the business successfully or satisfactorily. The defendant was a creditor of the firm. He had loaned to them something over $5,000, for which he held as security a chattel mortgage on the fixtures and machinery of the firm. He was, therefore, to some extent at least, a secured creditor. He represented to plaintiff that he had advanced all the money for the business of the firm; that he was determined to get rid of his son's partner, who was drawing money that was his money; that the business was not paying, and he wanted to give it up, or he was going to conduct it alone or through his son; that if plaintiff tried to collect his debt he would not be able to get anything; that there was a chattel mortgage against the property; that he had furnished money himself for which he had a mortgage, or would get one, and plaintiff could not get anything; that the only way and the best way would be to give the firm time; that it was late in the season, and by waiting until the next summer they could sell their beer; and that he would pay plaintiff for the two notes. That is plaintiff's account of the conversation given on his direct-examination. On his cross-examination he added that defendant said he had a claim or a confession or a mortgage or some security for the amount of money due him, and that plaintiff could not get anything anyway, and that the money that was due defendant was the first to be paid out of the firm. Upon the basis of this evidence the plaintiff contends that the defendant had a direct personal interest in procuring a forbearance to sue the firm, which he explains in his brief by saying "that if the plaintiff pressed the collection of the notes, and did not wait till the then next summer, defendant would lose his money," which had been loaned to the firm. But I do not discover a single fact in the case which tends to any such conclusion. I have not overlooked the proof that the plaintiff, while saying nothing of the sort in his first detail of defendant's words, did later add that defendant declared he would lose his money if plaintiff forced a collection. But this was merely an expression of an opinion or fear, not only without anything to justify it, but in direct contradiction of every fact bearing upon the situation, and indicating defendant's relations with the firm. It was a fear without a foundation—a state of mind, and not a result of existing facts seen in their legal bearing. The defendant was a secured creditor of the firm. Delay on the part of plaintiff is not shown to have been of the slightest consequence to the interest of defendant.

It is not pretended that his security was inadequate. Beyond that he asserted that he was to be first paid, and that plaintiff could get nothing if he sued. When the conversation took place the first note had not matured, and could not be sued under about a fortnight. It is not sug-

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gested or shown that defendant's claim was not due, and there was ample time, if further security was needed, to sue and levy in advance of plaintiff. That delay by the latter was in the slightest degree material to the safety of defendant's debt is a purely gratuitous assumption. The evidence is all to the exact contrary. The motive disclosed was regard for his son, and desire that his business credit should not be damaged by a failure. The purpose for which he sought delay was wholly in the interest of that son, and to enable him to market his beer the next summer, and so procure the means to pay the plaintiff without sacrifice or discredit. The debt of the firm was in no sense defendant's debt. No consideration of benefit moved to him from either party, and least of all had there been any new dealing with either which put upon him a duty of payment. Before the promise was made he owed no such duty and came under no such obligation. The doctrine of this court clearly stamps the promise as collateral and void for want of a writing. Indeed, the proof shows that the plaintiff himself did not mistake its character. On the 1st of September, 1880, he says defendant called to get his signature to a paper which recited the ownership by defendant of a chattel mortgage on property of Wheatcroft & Rintoul, and, although he signed it, he testified, "My remark that I did not want to sign the paper was caused by my surprise that the man should ask me to sign that paper when he had just guaranteed my debt." Wheatcroft was present at that interview, and called as a witness for plaintiff, and testified that he thought defendant said to plaintiff, "I have already promised to see you paid," and added that the words were distinctly impressed upon his memory. John Flintoff was also present at that conversation, and was called by plaintiff, relating its language thus: "'But,' said Mr. White, 'you said you would see me paid,' and Mr. Rintoul assented to the proposition. He said, 'For the matter of that, I said I will see you paid.'" So that not only do no facts appear which make defendant's safety depend upon plaintiff's forbearance, but the very promise itself by the plaintiff's own admission and the recital of his witnesses was a guaranty of the firm's debt and contingent upon non-payment by them. The case is one in which a faithful observance of the statute of frauds requires us to say that the promise sued on is void for want of a writing.

The judgment should be reversed, and a new trial granted, costs to abide event. All concur.

Judgment reversed.[27]

[27] Accord: Ames v. Foster, 106 Mass. 400, 8 Am. Rep. 343 (1871); Byrd v. Hickman, 159 Ala. 505, 48 South. 669 (1909); Carleton v. Floyd, 192 Mass. 204, 78 N. E. 126 (1906).

Contra: Mitchell v. Griffin, 58 Ind. 559 (1877).

In White v. Rintoul (the principal case) the promise was made to the creditor after the original credit had been granted. The case is therefore not one of indemnity but of a promise made to the creditor upon a new consideration, i. e., a detriment to the promisee.

The case of White v. Rintoul contains a clear description of the steps by which the rule has become settled in New York that the test of a guaranty

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LAMKIN v. PALMER.

(Court of Appeals of New York, 1900. 164 N. Y. 201, 58 N. E. 123.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered December 30, 1897, affirming a judgment in favor of plaintiff entered upon a verdict, and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

HAIGHT, J. This action was brought to recover the sum of $2,150 upon an oral promise of the defendant to pay the plaintiff that sum out of the proceeds of the sale of the property of the M. S. Robinson Musee Company.

The facts are somewhat complicated, but, for the purpose of raising the questions presented upon this appeal, they may be briefly stated as follows: The plaintiff was an employé and stockholder in the M. S. Robinson Musee Company, a corporation operating theaters in the city of Buffalo and in the city of Rochester. He had loaned to the president of the company, M. S. Robinson, to be used by the company in the operation of its theaters, the money in question. The Buffalo theater had been destroyed by fire, and the defendant had become obligated to pay certain indebtedness incurred by the Rochester theater. He had procured from a person in Detroit an offer to purchase from him the

is not the non-existence of a subsisting liability, but that, even though there may be a subsisting liability, the second promise will not be a promise to pay the debt of another, if such new promise is supported by a new consideration, consisting of a benefit to the promisor; e. g., material delivered and used in the defendant's house under a prior subsisting contract between the builder and the plaintiff. Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516 (1885). See, also, Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 331 (1895). Lamkin v. Palmer, 164 N. Y. 201, 58 N. E. 123 (1900).

The test in such cases, therefore, in New York, is the character of the consideration and the contingent or absolute nature of the promise. If the consideration consists merely of a detriment to the promisee, White v. Rintoul (where the consideration for the defendant's promise consisted in nothing but the plaintiff's forbearance to sue) establishes that such a consideration is insufficient, and that the second promise is within the statute. Nor is merely a receipt of property by the promisor from the promisee an effective consideration, unless the title becomes absolutely vested in the promisor, and, further, not unless the promisor personally obligates himself to discharge the debt, and not merely to apply the assets in his hands to its extinguishment. Therefore merely putting property in the hands of another, who thereupon promises the creditor to apply that property to the payment of the debt, is not such a consideration as will take the case out of the statute. Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693 (1885). On the other hand, in New York, where the title to the property absolutely passes to the promisor, who personally obligates himself to the creditor to discharge the prior debt, the promisor is held liable, "irrespective of the liability of the principal debtor." Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 331 (1895).

The writer submits, however, that the statute should apply neither where the defendant becomes liable at all events, because there the defendant is a debtor, nor where the defendant agrees to sell and account, for then he is an accountant. See note to Williams v. Leper, p. 135.

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Rochester property, and was endeavoring to procure the consent of the stockholders for the sale to him of such theater, to the end that he might accept the offer of the Detroit gentleman and effect a sale to him, and then appropriate the proceeds to the payment of the debts of the Rochester theater which he had become obligated to pay. The defendant, in order to induce the plaintiff to sign the consent, made the agreement upon which this action is founded. The defendant, by his answer, denied many of the allegations of the complaint, and then alleged: "That the agreement referred to in the complaint, if made at all, was made without consideration, and the same, not being in writing, was void by the statute of frauds of the state of New York." Upon the trial, at the conclusion of the plaintiff's evidence, the defendant moved for a nonsuit upon the grounds that the plaintiff had failed to establish a cause of action, that the contract proven was made absolutely without any consideration, and that it was void under the statute of frauds. The motion was denied, and an exception was taken. The same motion was renewed at the conclusion of the evidence, with a like ruling and exception.

We are of the opinion that these exceptions do not raise any question which this court has the power to review. Ordinarily the question as to whether the contract is void under the statute of frauds is a question of law, which may be reviewed in this court under an exception taken to a refusal to non-suit upon that ground; but in this case the question is dependent upon the determination of a fact at issue under the pleadings, and that is as to whether there was a consideration sufficient to sustain the contract. If there was a new and distinct consideration, moving to the defendant and beneficial to him, the promise to pay was not within the statute. Leonard v. Vredenburgh, 8 Johns. 29, 30, 5 Am. Dec. 317; Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516. The question, therefore, is as to whether there was a new and distinct consideration moving to the defendant out of which he expected to derive a benefit. This called for a determination of a question of fact, which has been settled by the verdict and the unanimous affirmance of the judgment entered thereon by the Appellate Division. Szuchy v. Hillside Coal & Iron Co., 150 N. Y. 219, 44 N. E. 974; Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; Ayres v. D., L. & W. R. R. Co., 158 N. Y. 254, 53 N. E. 22; Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; Cronin v. Lord, 161 N. Y. 90, 55 N. E. 397; Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548.

In submitting the case to the jury the court refused to charge the defendant's request to the effect that it was not necessary that every stockholder should give his consent either in writing or orally in order to enable the trustees to make a valid sale of the property of the corporation. Assuming, for the purpose of this case, that the request presented a sound proposition of law, we are of the opinion that no error was committed by the refusal of the court to so charge, for the reason

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that it had no application to the facts of this case. The plaintiff had furnished money to be used in carrying on the business of the corporation. He was a creditor and had the right to seek indemnity from the assets of the company. The defendant was seeking a transfer of the assets of the company, so that he could convert the same into money and pay off the debts that he had become obligated to pay. The plaintiff, by his consent, released his right to follow the assets for the satisfaction of his claim, and accepted the promise of the defendant to pay him out of the proceeds of the sale. The contemplated purchaser refused to complete the purchase unless the claim of the plaintiff was settled or his consent to the transfer obtained. The sale was for $12,000. The transaction was, therefore, beneficial to the defendant, for it enabled him to relieve himself of a greater portion of the obligations assumed by him to the other creditors. The question of consideration to support the agreement was not, therefore, dependent solely upon the consent of the plaintiff as stockholder.

The other exceptions to which our attention has been called were properly disposed of by the Appellate Division.

The judgment should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, BARTLETT, VANN, LANDON, and CULLEN, JJ., concur.

Judgment affirmed.

BAILEY v. MARSHALL.

(Supreme Court of Pennsylvania, 1896. 174 Pa. 603, 34 Atl. 326.)

Assumpsit on a verbal promise. Before Waddell, P. J. The facts appear by the opinion of the Supreme Court. The court entered a compulsory non-suit, which it subsequently refused to take off.

Error assigned was in refusing to take off non-suit.

Mr. Justice DEAN. Whether the debt in controversy be that of him who has assumed to pay it, or of another, is in most cases a question of fact. There can be no precise legal definition of liability under the act of 26th of April, 1855 (P. L. 308), which will determine in all cases, perhaps in but very few, the answerability of him who promises to pay. The act says: "No action shall be brought whereby to charge * * * the defendant upon any special promise to answer for the debt or default of another unless the agreement * * * shall be in writing." This is clearly meant to relieve an alleged guarantor or surety; it was never intended to relieve him who had a personal beneficial interest in the assumption. There cannot be a better construction of this statute than in Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291, where we held the present Chief Justice rendering the opinion, that: "It is difficult, if not impossible, to formulate a rule, by which to determine in every case, where a promise relating to the debt or liability of a third person is or is not within the statute; but as a general rule,

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when the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt, for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay, or discharge the debt of another, his promise is not within the statute."

Applying these principles to the facts in the case before us, to what conclusion do they impel us? In September, 1892, Mary E. Bailey held a note against Davis Pennock in sum of $1,000, with power of attorney to confess judgment. At this time, Marshall, the defendant, entered a judgment against Pennock for $5,000, issued execution, and levied on all the real and personal property of Pennock. The amount actually due and payable on his $5,000 judgment did not exceed, as appeared afterwards from his own statement, $200. The plaintiff was standing there with her judgment ready for entry, on which she could immediately issue execution, seize and bid upon the property. Just at this juncture, Marshall, knowing her rights, sent for her and said: "I will stand by thee and see thee is paid every cent if thee says nothing and does nothing." She accepted his proposition, neither entered her judgment, nor took any steps to collect it. The sheriff's sale went on, and Marshall bought the larger part of the real and personal property, and was credited on his purchase with the amount of his own judgment.

We notice by the testimony that Marshall denies the statement of Mrs. Bailey. We express no opinion as to the credibility of the witness. The question is, if the jury believed Mrs. Bailey's testimony, would the court have been warranted in granting the compulsory non-suit on the ground that the promise was to answer for the debt or default of another? What was the leading object of Marshall in making the promise by which he lured her to inaction? Clearly, it was not to pay Pennock's debt, nor Mrs. Bailey's claim. His sole purpose was to silence her as an antagonistic bidder at the sheriff's sale. This was no benefit to Pennock, the debtor. It was an advantage to Marshall, and he reaped the full fruits of it. She was silenced by his promise, and he got the property at his own figure. His leading object was to subserve his own interest; in fact, he had no other object. Having accomplished it, he is now called upon to answer, not for Pennock's debt, but for his own, and, if Mrs. Bailey be believed, he ought to pay.

The decree of the court below entering compulsory non-suit is reversed, and procedendo awarded.

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GUILD & CO. v. CONRAD.

(Court of Appeal, on Appeal from the Queen's Bench Division. [1894] 2 Q. B. 885.)

LINDLEY, L. J.[28] This case is one of considerable difficulty and very near the line. The question is, What is the nature of the promise which the defendant made to the plaintiff? It appears that the real plaintiff, Mr. Binney, is a merchant who was in correspondence with a Demerara firm of Conrad, Wakefield & Co., one of the partners in which was a son of the defendant; and by a letter of June, 1888, the defendant agreed that, if the plaintiff would give credit to the Demerara firm to the extent of £5,000., the defendant would indemnify the plaintiff to that extent. There is no question that that was a guarantee in the proper sense of the term; that is to say, it was an undertaking by the defendant to be responsible for the Demerara firm for £5,000. This was in writing; but by a verbal guarantee the amount was enlarged afterwards, in March, 1891, to £6,000. The plaintiff claimed that enlarged amount under this verbal guarantee; but the learned judge below has decided this claim in favor of the defendant, and no appeal has been brought in respect of that decision. As time went on, the Demerara firm got overdrawn; and at last, in December, 1891, the plaintiff was so reluctant to accept their bills that he eventually declined to do so; and an interview then took place between the plaintiff and defendant and Wakefield, a member of the Demerara firm. This interview took place on December 31, 1891, when bills of that firm for £5,950. were about to become due, but which the plaintiff would not accept; and in the following January a second interview took place in consequence of some further bills to the amount of £5,280. One of the difficult points in this case is to find out what took place at those interviews. The promises said to have been made were verbal only. Wakefield, one of the parties present at the interviews, is dead. The testimony of the plaintiff and the defendant upon the subject differ entirely. The plaintiff's version is to the effect that the defendant undertook to indemnify him against those bills if he, the plaintiff, would accept them. The defendant's version is that he did not give any such undertaking; and that was the controversy which was before the jury. The jury has decided that controversy in favor of the plaintiff. They have found, after hearing the evidence, that the defendant is wrong; that he did in fact make a promise to find the funds for both batches of bills, and to indemnify the plaintiff against them.

I do not now consider the question of the form of the promise—whether it imposed a primary or a secondary liability. I pass that by for the moment. But the struggle on the main point resulted in favor

[28] The statement of facts is omitted in consequence of the full statement in the opinion.

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of the plaintiff. The jury were then discharged, and it was arranged that any other questions which might arise in the case should be left to the judge. The judge then addressed his mind to the question whether the promise found by the jury to have been made by the defendant was in such a shape that the statute of frauds rendered it nugatory unless it was in writing, or whether it was such that the statute of frauds did not apply to it. The question whether that was brought before the jury seems a little uncertain. The learned judge, having seen the witnesses and read the correspondence, came to the conclusion that the promise was to the effect I will state presently. I will read the learned judge's own words. At the end of his judgment he says the defendant's promise "was not a contract to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay. The contract was to find funds to enable the plaintiff to meet these acceptances." Now, whether the jury meant that or not is doubtful. The question is one of fact, and if it was not decided by the jury then it was left to the finding of the judge, and I have read what his finding was. Ought we to differ from that finding? We are urged to say that the judge was wrong in his finding; that the evidence did not come up to that; and that the defendant's promise was merely a contract to pay the plaintiff if the Demerara firm did not pay. That, in my opinion, is a difficult question. The evidence is loose unquestionably; but I cannot bring my mind to say that it cannot bear the construction which the learned judge put upon it. The nature of the promise is all-important; because, if it was a promise to pay if the Demerara firm did not pay, then it is void under the statute of frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the statute of frauds.

I think that the learned judge has taken the true view, though it is very near the line. I cannot help thinking that the true result of those interviews was this—that the defendant did promise the plaintiff that, if he would accept those batches of bills, he, the defendant, would take care that they should be met, and that he himself would provide funds to meet them; and it was on the faith of that promise that the plaintiff accepted those bills. If this is the real contract, and if the learned judge is right in saying that the contract was not a contract to pay if the Demerara firm did not pay, but was a contract to pay in any event, then, in my opinion, the authorities show that the statute of frauds does not apply. The authorities are Thomas v. Cook, 8 B. & C. 728, and Wildes v. Dudlow, Law Rep. 19 Eq. 198. Thomas v. Cook appears to me to be undistinguishable from this case, if the facts here are such as I take them to be. There a man named Cook and a man named Morris had been in partnership; and on the dissolution of the partnership it was agreed that Cook should pay the partnership debts, and it was also agreed that a bond of indemnity, executed by W. Cook,

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since deceased, and two other persons, should be given to Morris to save him harmless from the payment of those debts. It being necessary that two sureties should be found to join in the bond, the plaintiff agreed to become one of the sureties on a promise by the defendant to indemnify him, the plaintiff, from all liability by reason of his joining in the bond. The decision was as follows: After pointing out that Morris was a creditor, Bayley, J., said this: "Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." Then Parke, J., said: "This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiffs should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same."

I need not refer to other cases which have followed that; but I must notice the argument which has been addressed to us that Thomas v. Cook, 8 B. & C. 728, is bad law. Unquestionably it was not followed by the Court of Queen's Bench in Green v. Cresswell, 10 Ad. & E. 453, and Cripps v. Hartnoll, 31 L. J. (N. S.) Q. B. 150, 2 B. & S. 697; but, notwithstanding the criticism of the learned judges in those cases, Thomas v. Cook, supra, was set on its feet again by the decision of the Court of Exchequer Chamber in the latter case, 32 L. J. (N. S.) Q. B. 381, 4 B. & S. 414, and it has since held its ground, and after the decision in Eastwood v. Kenyon, 11 Ad. & E. 438, it is impossible to hold that a promise made by the defendant to the plaintiff to indemnify the plaintiff against a debt due from him to a third person is within the statute, and therefore required to be in writing. In my opinion the decision in Thomas v. Cook, supra, was right, and it is treated as good law in Hargreaves v. Parsons, 13 M. & W. 561, and it is supported in Reader v. Kingham, 13 C. B. (N. S.) 344. The modern cases of Wildes v. Dudlow, Law Rep. 19 Eq. 198, and In re Bolton (1892) W. N. 163, 8 Times L. R. 668, are equally good law. Such being the case, it follows that the main defense here—namely, that the promise is bad as not being in writing within the statute of frauds—breaks down.

[The Lord Justice then dealt with certain other points urged on behalf of the appellant upon the facts of the case, and held that those points failed. The Lord Justice continued:]

The main questions are, What was the promise? And, secondly, whether the promise was such as is required by the statute of frauds

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to be in writing. The promise is, in my opinion, clear; and the court below has found that the promise was a promise to indemnify, and therefore not within the statute of frauds. That decision is, in my opinion, right, and therefore the appeal must be dismissed.[29]

Appeal dismissed.[30]

III. Promises Made upon the Extinction of the Original Debt—Novations

ROE v. HAUGH.

(Court of Exchequer, 1703. 1 Salk. 29.)

A. was indebted to B. and C. in consideratione quod B. accipere vellet ipsum C. fore debitorem ipsius B. pro viginti libris debit. eidem B. per A. in vice & loco ejusdem A. super se assumpsit, & eidem B. promisit, quo ipse easdem 20 L. eidem B. solvere vellet. Whereupon B.'s executor brought an assumpsit versus C. averring that B. accepted him fore debitorem ipsius B. without saying that A. was discharged; and on non assumpsit, verdict, and judgment pro quer. and judgment affirmed in Cam. Scaccar. where they held, it being after verdict they ought to do what they could to help it, and therefore they would not take it as a promise only on the part of C. because as such it could not bind, except A. was discharged; but they construed it as a mutual promise, viz.: That C. promised B. to pay the debt, and B. promised in consideratione inde to discharge A. By which means, if B. sues A. he subjects himself to an action of debt for the breach of his promise.

[29] Lopes and Davey, L. JJ., delivered concurring opinions, which are omitted.

[30] In England, the doctrine of the principal case had been previously recognized in Adams v. Dansey, 6 Bingham, 506 (1830).

Accord (on point that a promise to indemnify is not within the statute): Conkey v. Hopkins, 17 Johns. (N. Y.) 113 (1819); Chapin v. Merrill, 4 Wend. (N. Y.) 657 (1830); Tighe v. Morrison, 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617 (1889); Sweet v. Colleton, 96 Mich. 391, 55 N. W. 984 (1893); Garner v. Hudgins et al., 46 Mo. 399, 2 Am. Rep. 520 (1870).

Accord: Wills v. Shinn, 42 N. J. Law, 138 (1880).

In Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413 (1907), a promise by one indorser to another to save the latter harmless, where the maker of the note gave security to protect the defendant, was held not to be within the statute. But see Wilkie v. Marshall, 77 N. J. Law, 272, 72 Atl. 30 (1909).

In Pennsylvania, it is. Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291 (1886).

Accord: Chapin v. Lapham, 20 Pick. (Mass.) 467 (1838).

In Kansas, semble not. Patton v. Mills, 21 Kan. 163 (1878).

In Illinois, it is not. Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875 (1894).

Also in Hartley v. Sandford, 66 N. J. Law, 627, 50 Atl. 454, 55 L. R. A. 206 (1901).

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It was affirmed by the opinion of four judges against three, viz.: TREBY, LECHMERE, NEVIL, and POWYS, to affirm; and WARD, POWELL, and BLENCOE, to reverse.†

MERIDEN BRITANNIA CO. v. ZINGSEN.

(Commission of Appeals of New York, 1872. 48 N. Y. 247, 8 Am. Rep. 549.)

Appeal from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment entered upon the report of referee in favor of the plaintiff.

This action is brought to recover a balance claimed to be due upon a contract by which defendant assumed to pay the debt of a third person.

The defense is that the agreement is void under the statute of frauds. Found among other things as follows:

On the 31st day of January, 1861, one L. H. Mattison was indebted to the plaintiff in the sum of $1,580.07, which indebtedness the said Mattison was unable to pay.

A verbal agreement was made between said Mattison and the defendant, Godfrey N. Zingsen, that if Zingsen would settle said debt with plaintiff, so that Mattison could be released, Mattison would pay said Zingsen the amount thereof as follows, viz., $1,000 cash, and the balance in notes without indorsement.

An agreement was thereupon made in writing between said plaintiff and said defendant as follows, viz.:

"New York, January 31, 1861.

"I agree to furnish to the Meriden Manufacturing Company an assortment of plated forks and spoons per L. H. Mattison's price list, at 70 per cent. discount, to settle claim against L. H. Mattison, to be delivered in months of February and March. Oval tip'd and Olive not to be ordered.

"The plain and tip'd goods not to exceed ¼ of the amount. The spoons and forks to be silver plated like sample shown.

"[Signed] G. N. Zingsen."

"This is to certify that we agree to give our claim against L. H. Mattison up to G. N. Zingsen as soon as he has delivered to us the amount at 70 per cent. discount, in spoons and forks as per agreement.

"[Signed] Meriden Britannia Company,
"H. C. Wilcox."

H. C. Wilcox was the agent of the company. The said written instruments were made and delivered at one and the same time.

† Accord: Bird v. Gammon, 3 Bing. N. C. 883 (1837).
"The party who alleges such agreement for the discharge of the old debt is bound to prove a distinct agreement to that effect."—Staples v. Davis, 75 N. H. 383, 74 Atl. 872 (1909).
See the essay on Novation by Professor Ames in 6 H. L. R. 184.

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About the same date, Mattison, according to his agreement with defendant, paid him $1,000, and gave to him notes, payable at various dates, amounting in the aggregate to $594.50.

On or about the same date the plaintiff released Mattison from the said claim against him. Defendant had delivered to the plaintiff, pursuant to the agreement, plated ware to the amount of $1,225.19; and a balance amounting to $354.88 remained due to the plaintiff, for which sum, with interest, the referee ordered judgment in favor of the plaintiff.

EARL, C. There are two theories, upon either of which this judgment can be upheld. We may treat the defendant's agreement as one to pay and discharge the debt of Mattison.

This agreement the defendant claims to be void under the statute of frauds, which provides that "every special promise to answer for the debt, default or miscarriage of another person" shall be void, unless such promise be in writing, expressing the consideration thereof and subscribed by the promisor.

It is not every verbal promise to pay the debt of another that is void within this statute. There are many exceptions, as disclosed by the numerous cases upon the subject.

A promise to pay the debt of a third person is not within the statute, where it is agreed between the parties, the creditor, debtor and promisor, that the debt shall be extinguished and the creditor shall look only to the promisor for payment upon the new promise. In such case no other person remains liable for the debt but the promisor, and his undertaking is not collateral but original to pay his own debt, and not to answer for the debt of another. There is then what is known in the civil law as a delegation, and the creditor takes a new debtor, who is called the delegated debtor.

In Anstey v. Marden, 4 Bosanquet & Puller, 124, Chief Justice Mansfield says that he did not see "how one person could undertake for the debt of another, when the debt for which he was supposed to undertake was discharged by the very bargain." In Mallory v. Gillett, 21 N. Y. 412, Chief Judge Comstock, after a very able review of many cases arising under the statute of frauds, gives a classification of the cases not within the statute, and of such cases are these: "When the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, when such new undertaking is accepted as a substitute for the original demand." In Throop on the Statute of Frauds, at pages 318, 322, 370, 374, will be found a very able and discriminating review of the cases upon this subject, and the author lays down these rules: "A promise to assume an antecedent liability of a third person is without the statute, if the third person's liability had become extinct at the time when that of the promisor came into existence, or if the third person's antecedent liability to the promisee is discharged in consideration of its assumption by the promisor."

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And, in this case, it was distinctly agreed between the three parties—the creditor, debtor and promisor—that in consideration that the father of the debtor would pay the promisor $1,000 in money, and the debtor give him his own notes for the balance, the promisor would pay the claim of the creditor in plated ware, in the months of February and March thereafter, and the creditor should release the debtor. It was obviously contemplated by the parties that all this should be done at the same time. In pursuance of this agreement the promisor executed the written undertaking to the creditor, and either then or soon after, the creditor released the debtor, and the $1,000 was paid and the debtor's notes given to the promisor, and the notes were subsequently paid. Hence this case is clearly within the rules above stated, and the promise of the defendant is not within the statute of frauds. But if this is not the true theory upon which this case should be disposed of, then there is another theory, equally fatal to the defense of the defendant.

The two instruments dated January 31, 1861, executed at the same time, relating to the same subject-matter, must be construed together as if they constituted but one instrument; and then, as claimed by the defendant, they show a sale of the plaintiff's demand against Mattison to the defendant in consideration of the plated ware to be delivered to the plaintiff by the defendant. Upon this assumption, the defendant claims that the plaintiff must be defeated, because he has never assigned or offered to assign his demand to the defendant, and has placed it out of his power to do so, as he released Mattison.

According to this construction of the agreement between the parties, the defendant was to deliver the plated ware from time to time during the months of February and March, and as soon as he had delivered the whole of it the plaintiff was to give up to him his demand against Mattison. They were not dependent agreements. Performance on one part was not a condition precedent to performance on the other. The plaintiff was clearly not bound as a condition precedent to assign the claim before the defendant was bound to deliver the plated ware. He was not bound to assign it until after the defendant had fully performed on his part. Hence, this case is fully within the rule laid down in Morris v. Sliter, 1 Denio, 59. In that case the action was in covenant by the vendor for the purchase money upon a contract for the sale of land. The purchaser was to pay the price of the land in five years from the date, with interest annually, and to pay the taxes on the land, and the vendor covenanted that "after" the purchaser "shall have paid the above sums of principal and interest, at the time and in the manner above specified, and shall have performed the agreement above mentioned," he would sell and convey the land. Chief Justice Bronson says: "Where it appears, from the terms of the agreement or the nature of the case, that the things to be done were not intended to be concurrent acts, but the performance of one party was to precede that of the other, then he who was to do the first act may be sued,

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although nothing has been done or offered by the other party. He has not made performance by the other party a condition precedent to his liability, but has trusted to a remedy by action on the agreement.

Here the defendant, after he had performed, could have sued the plaintiff upon his agreement to assign, and could have recovered such damages as he could have proved. And the plaintiff having put it out of his power to assign the claim, the defendant could probably have set up his claim for damages as a counterclaim in this action. But what damages has the defendant sustained? What possible good could an assignment do him? The referee has found that Mattison has fully paid to the defendant the whole amount of the claim. And hence, the discharge of the claim by the plaintiff can work no possible harm to the defendant. And the discharge could work no harm, even if Mattison had not paid the defendant, because, before the discharge was executed, Mattison became obligated to pay the amount directly to the defendant, and that obligation the plaintiff never, in any way, interfered with or discharged.

Hence, upon the whole case I can see no reason to doubt that the judgment below was fully authorized by the facts of the case, and it should be affirmed, with costs. All concur.

Judgment affirmed.[31]

[31] Accord: Booth v. Elghmie, 60 N. Y. 238, 19 Am. Rep. 171 (1875); Urquhart v. Brayton, 12 R. I. 169 (1878); Edenfield v. Canady, 60 Ga. 456 (1878); Howell v. Field, 70 Ga. 592 (1883); Welch v. Kenny, 49 Cal. 49 (1874); Helms v. Kearns, 40 Ind. 124 (1872); Lee v. Porter, 18 Mo. App. 377 (1885); Provenchee v. Piper, 68 N. H. 31, 36 Atl. 552 (1894); McLaren v. Hutchinson, 22 Cal. 187, 83 Am. Dec. 59 (1863); Howell v. Harvey, 65 W. Va. 310, 64 S. E. 249, 22 L. R. A. (N. S.) 1077 (1909); Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516 (1895); Clifford v. Luhring, 69 Ill. 401 (1873).

Compare Mannetti v. Doege, 48 App. Div. 567, 62 N. Y. Supp. 918 (1900).

Where a partially executed contract between the plaintiff and a third person has been rescinded by the plaintiff, an absolute parol promise of the defendant will render him liable to pay for the completion of that contract, by the plaintiff. Thus, where a contractor named Dickey contracted with county commissioners to erect a courthouse, and one Slagle to manufacture 300,000 bricks for Dickey, and Slagle, the plaintiff, refused to allow Dickey any more bricks without money, whereupon an agreement was made with the commissioners that they would pay for future delivery if Slagle would continue to deliver bricks, the promise was held not to be within the statute. Jefferson County v. Slagle, 66 Pa. 202 (1871); Merriman v. McManus, 102 Pa. 102 (1883).

Compare Brown v. Weber, 38 N. Y. 187 (1868).

On the other hand, where the prior partially executed contract is not rescinded, but the plaintiff, after a parol promise of the defendant, "Keep on to work just as you have been to work; we will see you paid," works for and is paid by a third party, the defendant is not liable. Lewis v. Lumber & Mfg. Co., 156 Pa. 217, 27 Atl. 20 (1893).

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IV. Assignment of the Original Debt by Promisee or Creditor

ISRAEL v. DOUGLAS et al.

(Court of Common Pleas, Easter Term, 1789. 1 H. Bl. 239.)

The material facts of this case were as follows:

The defendants, who were partners, were indebted to one Delvalle, a broker, in £64. 9s. for brokerage, and Delvalle was indebted to the plaintiff in £40. on a promissory note. Delvalle afterwards applied to the plaintiff, to lend him a further sum, which the plaintiff refused to advance without security; whereupon Delvalle gave him an order on the defendants, for the sum in which they were indebted to him (Delvalle) for brokerage. This order was sent by the plaintiff to the defendants, in November, 1787, with a request that they would acknowledge their having given him credit for it. The defendant Douglas answered that they would pay the money which they owed to Delvalle to no other person but the plaintiff, but objected to the amount of the sum contained in the order, which they desired to have rectified. Another order was then sent to them, which Douglas again objected to do, promising at the same time to pay the plaintiff what they really owed to Delvalle, and requesting an order to pay or give credit to the plaintiff for so much in their hands as was in fact due to Delvalle. An order in this form was accordingly sent them, which they accepted, in consequence of which the plaintiff advanced £70. to Delvalle, who afterwards becoming a bankrupt, the defendants refused to pay the money to the plaintiff according to the order. On which refusal this action was brought. The declaration contained four counts: (1) Money had and received. (2) Money paid, etc. (3) Money lent, etc. (4) An account stated. Verdict for the plaintiff; which on a former day Lawrence, Serjt., contended was not supported by evidence under the form of action which the plaintiff had chosen, and therefore obtained a rule to show cause why it should not be set aside, and a new trial granted.

On this day, Mr. Justice Heath, who tried the cause, stated the evidence to the same effect as above, and cited the case of Fenner v. Mears, Hil. 19 Geo. III, C. B., 2 Blac. 1269.[32]

Lord Loughborough. The point made at the trial was that the plaintiff had misconceived his action. Now, where a party has not the substantial justice of the case on his side, the court will not favor any action which he may bring. But, where justice is clearly with him, they will, if possible, allow him to maintain the action he has brought, because the only effect of a refusal would be to make him adopt another form of action. In the present case it is admitted that

[32] The arguments of counsel are omitted.

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the plaintiff has the law with him in some action. But it has been argued that Delvalle ought to have brought the action. Yet I cannot conceive why that should prevent the plaintiff from having his remedy. It was also said that Delvalle's action should have been for work and labor. But, to admit this, we must strain a point, and suppose that Delvalle had really performed work and labor for the defendants. For, in general, the demand which a broker has upon his employer is for the difference of money on account between them for premiums, etc.; so that if he were to rest solely on a count in his declaration for work and labor, without the common money counts, he would be in danger of a non-suit.

It was farther contended that the money was in point of fact owing by the defendants to Delvalle; that their undertaking was to him; that in reality no money was had or received by them to the use of the plaintiff. But Delvalle had paid for premiums on account of the defendants, which created a debt from them, and which he might have set off against any similar demand of theirs against him. This debt is, with the consent of the parties, assigned to the plaintiff. Douglas has due notice of it, and assents, by which assent he becomes with his partner, liable to the plaintiff. He makes no objection to an order from Delvalle to pay his money to the plaintiff, but only to the amount of the sum to be paid. He insists that the whole demanded by Delvalle was not due, and therefore requires a looser order, on the faith that he would pay the balance; on his failure to pay, his promise attached, so as to make the defendants liable to an action.

Then the question is whether, when Israel brings an action in his own name against the defendants, this shall not be considered as money had and received by them to his use? Now, when Douglas had admitted the money to be due, he was that moment estopped, as it were, from saying that it was not due. I also think the action might be maintained on the account stated. Delvalle gives an order to pay to the plaintiff a liquidated balance; the only dispute is concerning the amount of that balance. Douglas says, "I will pay you according to the sum which shall appear to be due." He is here again estopped from denying the effect of his promise. I am therefore of opinion that the verdict is right, and ought not to be set aside.

GOULD, J. This case is like that of a man having money due to him in his hands, which I order him to pay to another. Now if I pay money to you for another person, it is money had and received by you to his use. But where is the real and substantial difference, whether I in fact pay money to you for a third person, or whether I give you an order to pay so much money, to which you expressly assent? In reason and sound law, it is money had and received to the use of such third person. If my debtor tenders me money, which I give back to him, and tell him to pay to another, he then in point of fact receives money to the use of the other. But is there any real difference between such a case and the present? As to the account stated, I think that count

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also, all the circumstances considered, comes within the fair compass of the case; but I have not the least doubt as to the count for money had and received.

HEATH, J. I think, in mercantile transactions of this sort, such an undertaking may be construed to make a man liable for money had and received.

WILSON, J. It is highly necessary that the forms of actions should be kept distinct. Courts of justice have, in my opinion, already gone quite far enough in extending the favourite count for money had and received. But I know of no case where they have gone so far as to allow that count to be maintained where no money has in fact been received by the defendant. Here it by no means appears that money was had or received by the defendants. I am also of opinion that this demand between the parties being for brokerage was, from the nature of it, the subject of an action for work and labor. Now, though it be true that where a man is my debtor he holds my money, yet I cannot accede to this as a general proposition, that whenever a man is my debtor I am entitled to bring an action against him for money had and received. A tailor might, according to this rule, bring an action for money had and received against a man who had not paid him for a suit of clothes. For my idea is that where no money has been actually had and received, no action for money had and received can be supported. In the case of Fenner v. Mears, money was in fact received by the defendant; there the action might clearly be maintained. So here it would have been proper if it could be shown that money was received by Douglas to the use of Delvalle.

I thought it necessary to say thus much because my Brother GOULD, whose opinion I very highly respect, and whose very dictum would at all times make me doubtful of my own judgment, has expressed his sentiments decidedly in favor of this count for money had and received. I do not, indeed, mean to say positively that the action will not lie, particularly as I agree in opinion with the rest of the court as to the count on the insimul computassent; but I very much doubt the position, which has been so strongly laid down, that the acknowledgment of the defendant Douglas, of the money being due to Delvalle, was evidence of money actually had and received by him; for I am not inclined to favor an implication which is contrary to fact.

Rule discharged.[88]

[88] Accord: Lord Holt in Ward v. Evans, 2 Ld. Raym. 928 (1702), held that indebitatus assumpsit would lie on the ground that the defendant having money in his hands it amounts to a receipt of so much by the defendant to the plaintiff's use. Fenner v. Meares, 2 Wm. Bl. 1269 (1779); Andrews v. Smith, 2 Cr., M. & R. 627 (1835); Lacy v. M'Neile, 4 D. & R. 7 (1824); Dixon v. Hatfield, 2 Bing. 439 (1825); Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593 (1877).

Contra: In Wharton v. Walker, 4 Barn. & C. 163 (1825), Bayley, J., said: "In the present case no money was ever had and received by the defendant

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COMPTON v. JONES.

(Supreme Court of New York, 1825. 4 Cow. 13.)

On demurrer. The declaration was in assumpsit: The 1st count stated, that on the 4th of February, 1823, the defendant made, etc., his certain deed, etc., dated, etc., and delivered the same to one S. T. Wood, by which he, for value received, promised to pay Wood, or bearer, $500, in four equal annual installments from that date; that Wood afterwards, etc., for a valuable consideration to him (Wood) paid, assigned and transferred the deed, etc., to the plaintiff, thereby constituted him the bearer thereof, and authorized and directed him to demand and receive of the defendant the contents of the deed, etc., for his own benefit; that afterwards and before the payment, etc., the plaintiff gave notice to the defendant of the assignment, etc.; that, in consideration of the premises, afterwards, etc., in consideration that the plaintiff would accept and agree to the defendant's promise in the declaration after mentioned, the defendant promised the plaintiff to pay him the money mentioned in the deed, averring that $250 had become due before the commencement of the suit.

General demurrer and joinder.[34]

SAVAGE, C. J., remarked, that what was said by the court in the authority cited by the defendant's counsel, was intended of a case where the action was brought by the party to the specialty. And the whole court were clear, that the action was sustainable, being on a promise to the assignee.

Judgment for the plaintiff.[35]

to the use of any person, which objection existed in Israel v. Douglas, and has caused the propriety of that decision to be since doubted."

In Liversidge v. Broadbent, 4 H. & N. 603 (1859), will be found an elaborately argued and reasoned opinion of the Exchequer, deciding exactly contra to Israel v. Douglas.

See Professor Ames' essay on Novation, 6 Harvard Law Review, 184, 188.

See Note on American cases in University of Pa. Law Review, April, 1909 (57 Am. Law Reg. 472), annotating a Vermont case. Barre Granite Co. v. Fraser, 82 Vt. 55, 71 Atl. 828 (1909).

The early English cases as represented by the principal case solved the problem by treating it as the assignment of a debt without allowing any objection to exist on the score of the doctrine of consideration. The original English view required no novation to have occurred, and hence the creditor to whom the assignment of the debt was made could sue his original debtor if the latter's debtor did not carry out the assignment and pay. Cuxon v. Chadley, 3 B. & C. 591 (1824). See Roberts v. Rowe, 75 N. H. 36 (1908).

[34] The argument of counsel is omitted.

[35] But cf. Blunt v. Boyd, 3 Barb. 209 (1848), where the defendant promised the debtor, X., to pay the plaintiff a debt due from X. to the plaintiff. The defendant was himself indebted to X. Held, that the promise was within the statute.

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DE BARRY v. WITHERS & PETERSON.

(Supreme Court of Pennsylvania, 1863. 44 Pa. 356.)

Error to the District Court of Philadelphia.

This was an action of assumpsit, brought November 19, 1859, by Withers & Peterson against John De Barry.

The plaintiffs' declaration averred that whereas, heretofore, to wit, on the 15th day of August, A. D. 1856, at the county aforesaid, the defendant drew his certain bill of exchange of the date last aforesaid, directed to Messrs. William L. Manderson & Co., bankers, Third street, Philadelphia, of said county, and thereby requested the said William L. Manderson & Co., 30 days after the date thereof, to pay to the order of himself, the said defendant, the sum of $5,000 for value received, and to charge the same to the account of flour per Revere, and the said defendant thereafter, to wit, on the day and year last aforesaid, and at the county aforesaid, indorsed the said bill of exchange, and delivered the same, then and still unpaid, to the said plaintiffs.

That afterwards, to wit, on the 17th day of September, in the year last aforesaid, and at the county aforesaid, the said bill of exchange was presented to the said William L. Manderson & Co. for payment thereof, and the said William L. Manderson & Co. were then and there requested to pay the said sum of money specified therein, according to the tenor and effect of the said bill of exchange, and of the said indorsement thereon; but the said William L. Manderson & Co. did not then pay the said sum of money, or any part thereof, nor have they at any time since paid the same, or any part thereof, but wholly refused so to do, of all which said several premises the said defendants there afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice, by means whereof the said defendant became liable, and in consideration thereof, then and there promised the said plaintiff to pay him the said sum of money specified in the said bill of exchange, when thereunto afterwards requested, yet the said defendant, although often requested, etc., disregarding, etc., did not nor would pay to the said plaintiff the said sum of money specified in the said bill of exchange, or any part thereof, but to pay the same or any part thereof, hath hitherto wholly neglected and refused, etc.

This was followed by the common counts for goods sold and delivered, goods bargained and sold, work done, and materials furnished, money lent, had and received, on an account stated, and for forbearance of plaintiffs.

With this narr. a copy of the instrument, viz., a bill drawn by De Barry, August 15, 1856, for $5,000, on William L. Manderson & Co., bankers, Third street, Philadelphia, to his own order, at 30 days, to be charged to account of flour per Revere, and indorsed by him, was filed by the plaintiff.

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To this an affidavit of defense, as also a bill of discovery, was filed by the defendant.

The defendant also pleaded the general issue.

By leave of the court the plaintiffs filed an amended count in which, after setting forth the drawing and indorsing of the bill above mentioned, they averred that afterwards, to wit, on, etc., at the county, etc., the defendant took the said draft to the office of the said William L. Manderson & Co., who then and there had no funds or property of the said defendant, then and there promised and agreed to and with the said William L. Manderson & Co., that if they the said William L. Manderson & Co. would accept said draft for the accommodation of said defendant, he, the said defendant, in consideration thereof, would take up said draft at maturity, and the said William L. Manderson & Co. then and there, at the special instance and request of the said defendant, and without having any funds or property of said defendant in their hands, and solely for the accommodation of the said defendant, accepted the said draft and delivered the same so accepted to said defendant. That afterwards, on the maturity of said draft, to wit, on the 17th day of September, in the year last aforesaid, and at the county aforesaid, the said defendant made default in the payment of the said draft, and the said William L. Manderson & Co. then and there, to wit, on the day and year last aforesaid, paid the sum of $5,000 in the said draft mentioned and took up the said draft, whereby a right of action accrued to the said William L. Manderson & Co., and against the said defendant, upon the said draft for the recovery of the said sum of $5,000, and by means whereof the said defendant then and there became liable to pay to the said William L. Manderson & Co. the said sum of $5,000 in the said draft mentioned, whenever he should be thereunto afterwards requested. That afterwards, to wit, on the day and year last aforesaid, and at the county aforesaid, the said William L. Manderson & Co., for a valuable consideration, theretofore had and received, transferred and delivered the said draft to the plaintiffs, and assigned to the said plaintiffs their said cause of action which had therefore accrued to the said William L. Manderson & Co. upon the said draft, for the recovery from the said defendant of said sum of $5,000 as aforesaid, by means whereof the said defendant then and there became liable to pay the said plaintiff the said sum of $5,000 in the said draft mentioned whenever he should be thereunto afterwards requested; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, and at the county aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said draft mentioned, when he, the said defendant, should be thereunto afterwards requested.

To this count the defendant's counsel demurred, for the following reasons:

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(1) No cause of action is alleged in the said count upon which the plaintiffs can recover in their own names.

(2) The alleged consideration for the transfer of the instrument of writing sued on, from Manderson & Co. to the plaintiffs, is insufficiently set forth.

(3) It is not alleged in said count that means were not furnished by the defendant to William L. Manderson & Co. to take up said instrument of writing at maturity.

(4) The instrument sued upon is not a bill of exchange—being payable out of a particular fund—and is therefore improperly declared upon as such.

The court below gave judgment for plaintiffs on the demurrer, on which the damages were assessed by a jury.

The defendant thereupon sued out this writ, averring that the court below erred in allowing the plaintiff to amend his narr. by filing a third count, containing an entirely new cause of action, overruling the demurrer, and assessing the damages by a jury that "never was or could have been summoned for that purpose."

READ, J. An accommodation acceptor, having paid a bill for which no funds are provided by the drawer, is entitled to recover the amount from the drawer, for the law, in the absence of any express contract, implies a contract to indemnify. But whether the action be for money paid, or specially for not indemnifying the plaintiff, still it is only a chose in action, which is assignable in equity, and therefore the suit must be in the name of the assignor for the use of the assignee. But as the assignee is the real owner, it would seem but just, if the debtor chooses expressly to promise to the assignee to pay the debt to him, that the assignee might sustain an action against him in his own name, and this was the view taken in the early English cases of Fenner v. Meares, 2 W. Bl. Rep. 1269; Israel v. Douglas, 1 H. Bl. Rep. 239. It would seem, however, that in England the rule at present is to require the consideration of forbearance, or some other new consideration, to enable the assignee to proceed in his own name. 1 Chit. Pl. 15; Addison on Contracts, 984.

In America, however, the early English doctrine has been adopted, and this is clearly the sound rule; for it is a promise to pay to the real owner of the debt, requiring no other consideration than the fact that the debtor is morally and equitably bound to pay it to his actual creditor, and is not allowed to discharge himself by paying it to any other person. This was the decision in Massachusetts as early as 1813, in Crocker v. Whitney, 10 Mass. 316, and reaffirmed in Mowry v. Todd, 12 Mass. 281. In Maryland, in Allstan v. Contee, 4 Har. & J. 351, a case argued by the present venerable Chief Justice of the United States, the same doctrine was held, and reaffirmed in Barger v. Collins, 7 Har. & J. 213. So in New Hampshire. Currier v. Hodgdon, 3 N. H. 82; Thompson v. Emery, 7 Foster, 269. And in Vermont. Moar v. Wright, 1 Vt. 57; Bucklin v. Ward, 7 Vt. 195. Such also is the

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case in Maine. Smith v. Berry, 6 Shepley, 122; Norris v. Hall, 6 Shepley, 332.

In New York the same rule prevailed prior to the Code, which directs that suits shall be in the names of the real parties in interest. Compton v. Jones, 4 Cow. 13; De Forrest v. Frary, 6 Cow. 151; Dubois v. Doubleday, 9 Wend. 317; Jessel v. Williamsburgh Ins. Co., 3 Hill, 88. In the Revision of Swift's Digest, vol. 1, p. 438, the law in Connecticut is thus stated: "The assignment of a chose in action will be a good consideration for the promise of the debtor to pay to the assignee, who may maintain an action in his own name on such promise." Which is also the settled law of Tennessee. Mt. Olivet Company v. Shubert, 2 Head, 116.

This rule, so reasonable in itself, and so consonant to our ideas of justice, decided the present case, for the only real question before us was whether the additional count disclosed a sufficient cause of action. There is nothing in the other assignments of error.

Judgment affirmed.[86]

HARGRAVES v. PARSONS.

(Court of Exchequer of Pleas, 1844. 13 Mees. & W. 560.)

Assumpsit.[87] * * * The cause was tried before Creswell, J., at the last Liverpool Assizes. The plaintiff proved two written contracts between the defendant and Parker, dated August 18, 1843, being each of them for the purchase by the defendant from Parker of the "put or call" of fifty Havre & Rouen shares, at any time before 18th February, 1844; "20s. to be paid down, to put or call at 32s. 6d. per share premium." The "puts or calls" were in the following terms:

"Liverpool, 18th August, 1843.

"To ————————: I, Charles Stewart Parker, of Liverpool, merchant, in consideration of the sum of £50. paid to me, the receipt of which I hereby acknowledge, do hereby agree, on behalf of myself, my heirs, executors, and administrators, to deliver or not deliver (at your option) to you, or to your order, ten days' clear notice being given, at any time on or before the 18th of February, 1844, fifty shares in the Havre & Rouen Railway, at the rate of £1. 12s. 6d. per share premium; and it is agreed that you are to be entitled to all advantages which are now due, and may accrue upon the said shares from this day up to the time the said shares may be called; it being expressly understood that

[86] Accord: Esling v. Zantzinger, 13 Pa. 50 (1850).

[87] The report of the case has been abridged.

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the said sum of £50. is my property, whether the said shares are called or not. C. S. Parker."

The shares rose, and on the 22d of November following the defendant resold these two calls to Messrs. Henry Davies & Co., share brokers, who acted for the plaintiff; 22s. 6d. to be paid down, and to put or call at £1. 12s. 6d. per share premium, on or before the 18th of February; the bought note expressing that "the buyer was to be entitled to all dividends and other advantages, and you [the defendant] to guarantee the seller;" and the defendant indorsed on the calls, which he delivered addressed in blank to Messrs. Davies & Co., the following engagement:

"Gentlemen: In consideration of £81. 5s., I undertake, on behalf of myself, my heirs and executors, to fulfil the terms of the within contract. George Parsons.

"Messrs. Henry Davies & Co."

The shares continued to advance in price, and on the 16th February, the price being then at £6. premium, Mr. Davies, one of the partners in the firm of Henry Davies & Co., met the defendant in the Stock Exchange room at Liverpool, and "called" the 100 shares, i. e., required the delivery of them by the defendant on the 18th of February; at the same time asking the defendant whether it would suit him to deliver them in Paris. The defendant said he would inquire, and called to them a Mr. Middleton, who was Parker's share broker, and was then in the room, and gave him notice that the plaintiff had called the shares; and by the assent of all the parties, it was arranged that the shares should be delivered by Parker at Messrs. Lafitte & Co.'s, in Paris, on the 2d of March. No writing passed on this occasion. A few days afterwards, however, Parker failed to a large amount, and the shares were not delivered on the 2d March, pursuant to the agreement. Messrs. Davies & Co., after giving formal notice to the defendant, on the 2d of April, to deliver them, bought in the 100 shares at Paris, at 700 francs per share; and in this action the plaintiff claimed to recover from the defendant the sum of £618., the difference between the price so paid and that at which the options were purchased from the defendant.

Several objections were taken for the defendant. * * *

[PARKE, B. The question is, whether this is not to be construed as an original agreement by the defendant for the delivery of the shares on the 2d of March. There was no privity between the plaintiff and Parker. We will consult the learned judge.]

Cur. adv. vult.

The judgment of the court was, on the 10th of December, delivered by

PARKE, B. In this case a motion was made by Mr. Watson for a nonsuit, on a point reserved, or for a new trial for misdirection, in

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a case tried before my Brother Creswell, at Liverpool. The court wished to refer to the learned judge's notes, to ascertain the facts more perfectly, and understand the objection raised.

It was an action by the plaintiff against the defendant upon two contracts made by him with the plaintiff, on the assignment of two other contracts between the defendant and Parker, for taking from or delivering to the defendant, at his option, certain shares in a foreign railway, at a fixed premium, on or before the 18th February, 1844; and the defendant agreed to guarantee the delivery by Parker to the plaintiff. There were counts on each agreement, and also on a variation of that agreement by a subsequent one, by which it was stipulated, that the shares, instead of being delivered in England, on the 18th February, should be delivered in France on the 2d March, by Parker. Several issues were raised on each count. One was on the allegation in the third and fourth counts in the declaration, that the defendant guaranteed the performance of the new agreement by Parker. Another, that no notice was given to Parker to deliver the shares. Another plea, the sixth, was that, after the notice to Parker, it was agreed between the plaintiff and Parker, without the knowledge or consent of the defendant, that the delivery should be postponed, and the issue thereon was, that it was not so agreed modo et forma. It appeared at the trial that notice was given by the plaintiff to the defendant, before the 18th February, to deliver the shares on that day, and the like notice by the defendant to Parker's broker, but that, at the request of the plaintiff, the defendant procured Parker's broker to agree to deliver at Paris on the 2d March instead. This agreement was by parol.

Three objections were made by Mr. Watson, at the close of the plaintiff's case, and reserved by the learned judge. The first and most important was, that a note in writing was necessary under the statute of frauds, because the agreement or guarantee by the defendant, for the performance by Parker of the new agreement, was a promise to answer for the debt or default of Parker. The learned judge intimated his opinion, that this was not a case within the statute, but was an original promise.

And we are of the same opinion. The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee. This was decided, and no doubt rightly, by the Court of Queen's Bench, in Eastwood v. Kenyon, 11 Ad. & Ell. 438, 3 P. & D. 276, and in Thomas v. Cook, 8 B. & C. 728, 3 Man. & R. 444. In this case Parker had not contracted with the plaintiff, nor was it intended that he should; there was no privity between them; the nonperformance of Parker's contract with the defendant would be no default towards the plaintiff, and, consequently, the undertaking by the defendant was no promise to answer for the default or miscarriage of Parker in any

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debt or duty towards the plaintiff. It was an original promise that a certain thing should be done by a third person. * * * There must, therefore, be no rule.

Rule refused.[38]

V. Debts Created for Benefit of a Third Party

MORRISON & CO. v. HOGUE.

(Supreme Court of Iowa, 1878. 49 Iowa, 574.)

Appeal from Appanoose Circuit Court.

The plaintiffs hold a promissory note executed by one Vandevent as principal and one Fowler as surety. The action is brought to collect of the defendant the amount of the note. The plaintiffs aver in their petition that the defendant agreed with Vandevent to pay it. They aver that the defendant purchased land of Vandevent, and agreed to pay the note as a part of the consideration. They also aver that Fowler, the surety, had brought an action in attachment against Vandevent, and that it was agreed between the defendant, plaintiffs, and Vandevent, that if the attachment was released defendant would pay the plaintiffs the amount of the note out of the consideration of the land, and that the attachment was released in pursuance of such agreement. The defendant demurred to the plaintiffs' petition, and the demurrer was overruled.

The defendant then answered, denying the agreement as to the release of the attachment, and averring that he was to pay the note as a part of the consideration of the land, but only upon the following condition: He was to pay first certain other indebtedness of Vandevent and expenses, the amount of which was not then definitely known, and the balance, if any, he was to apply on the note held by plaintiffs; and he avers that there was a small balance which he has applied on the note. The court held that the defendant's agreement is within the statute of frauds, and rendered judgment for defendant, the amount involved is less than $100, and the circuit court certifies that the question as to whether the agreement is within the statute of frauds is one upon which the opinion of the Supreme Court is desired. The plaintiffs appeal.

Adams, J. Two agreements are averred in the petition, one as made between the defendant and Vandevent, to pay the note as part of the consideration of the land, and the other as between the defendant, Vandevent, and the plaintiff, to pay the note, not only as a part

[38] Accord: Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593 (1877); Milks v. Rich, 80 N. Y. 269, 36 Am. Rep. 615 (1880). See Clark v. Jones, 85 Ala. 127, 4 South. 771 (1887).

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of the consideration of the land, but also in consideration of the release of the attachment. Neither agreement, we think, is within the statute of frauds. In either case the payment was to be made out of the consideration of the land, and in making such payment the defendant would be paying his own debt. In holding the agreements to be within the statute of frauds we think the court erred.

Whether the evidence is not such that judgment should have been for the defendant, notwithstanding the error, we do not determine. We deem it our province to pass merely upon the question certified to us.

Reversed.

FARLEY v. CLEVELAND.

(Supreme Court of New York, 1825. 4 Cow. 432, 15 Am. Dec. 387.)

Affirmed by Court of Errors, 9 Cow. 639.

On error from the Washington common pleas. Farley sued Cleveland in the court below, declaring specially that one Moon on the 22d November, 1815, gave the plaintiff a promissory note for $100, with interest, payable the 1st June thereafter; that on the 1st January, 1817, Cleveland, in consideration of 15 tons of hay (value $150) sold and delivered by Moon to him, at his instance, promised to pay the note of Moon to Farley.

On the trial, the plaintiff offered to prove the note, and that, in the spring of 1817, Moon absconded, just before which the defendant promised to pay Moon's note to the plaintiff, in consideration of 15 tons of hay, worth $10 per ton, to be delivered by Moon to him; that the hay was thereupon delivered to the defendant, and in consideration thereof he promised the plaintiff, by parol, to pay the note; that the next day Moon absconded.

The common pleas nonsuited the plaintiff, on the ground, that the promise, being to pay the debt of another and not in writing, was void within the statute of frauds, and that was the only question made on the argument here.[39]

CURIA, per SAVAGE, C. J. That part of the statute which relates to this case is as follows: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. Our statute is a transcript of the 29 Car. II. The English decisions, therefore, upon that statute, are entitled to consideration. We have been referred to several, before noticing which, the three classes of cases mentioned by Kent, C. J., in Leonard v. Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317, should be

[39] The argument of counsel is omitted.

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attended to. These are: (1) Where the promise of the defendant is collateral to the principal promise, but made at the same time; (2) where the collateral promise was subsequent to the original indebtedness and was made upon no other consideration but the liability of the original debtor; (3) where the promise arises out of some new consideration of benefit or harm, moving between the newly contracting parties, or, as expressed by Mr. Roberts (Rob. on Frauds, 232), "If it spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of a personal concern to himself." The first class needs no other consideration than the original debt to which it is collateral; the second does; and the third is not within the statute at all. In the two first cases the consideration must be in writing, as well as the promise; in the third, all may rest in parol, as in ordinary cases.

Buckmyr v. Darnall, 2 Ld. Raym. 1085, belongs to the first class. The defendant had promised the plaintiff to return his horse, if he would let him to one English, to ride to Reading. This was held to be collateral, because English was liable on the original bailment; and hence it must be in writing. So, also, in Jones v. Cooper, Cowp. 227, the promise was to pay the plaintiff, if the debtor did not, which was clearly within the statute. In Matson v. Wharam, 2 T. R. 80, the defendant applied to the plaintiff to sell goods to one Coulthard, and said, "I will see you paid." This was held to be void, being merely by parol. In Anderson v. Hayman, 1 H. Bl. 120, the defendant said, "use my son well, charge him as low as possible, and I will be bound for the payment of the money, as far as £800., of £1,000." The goods were charged to the son. The promise was held to be collateral and void, being by parol.

In this court, the case of Leonard v. Vredenburgh, as decided, belongs to the third class. The defendant promised in writing to guaranty a note of one M. Johnson, for $500, on which the guaranty was written.

The case of Fish v. Hutchinson, 2 Wils. 94, belongs to the second class. The plaintiff had sued one Vickars, and the defendant in consideration that the plaintiff would stay his action, promised to pay him the money owing to him by Vickars. The court decided this promise to be within the statute, as the original debt was still subsisting. So also in the case of Jackson v. Rayner, in this court (12 Johns. 291), the defendant in the court below promised the plaintiff below (who had sued the defendant's son), that he, the defendant, would pay the debt, as he had taken his son's property, and meant to pay his honest debts. The court decided that a promise in writing was necessary, and emphasized the fact that the original debt of the son was still subsisting. This case was decided on the authority of Simpson v. Patten, 4 Johns. 422, which will be hereafter noticed.

The third class, mentioned by Kent, C. J., as not within the statute, has been illustrated by the following cases: In Read v. Nash, 1 Wils.

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305, one Tuack, the plaintiff's testator, had sued one Johnson for an assault and battery, and the cause being at issue, the defendant promised, that, if Tuack would withdraw the record, he would pay him £50. and the costs. This was held an original promise, and that here was no debt, default or miscarriage. In Williams v. Leper, 3 Burr. 1886, the plaintiff was proceeding to distrain the goods of one Taylor, his tenant, for three quarters' rent, being £45., when the defendant, who was agent for Taylor's creditors, to sell the goods under an assignment of them, promised the plaintiff to pay the rent in arrear, if he would desist from distraining. It was contended that this promise should have been in writing, and that Taylor still remained liable till actual satisfaction. Lord Mansfield said the landlord had a legal pledge; he had a lien upon the goods; and that the statute did not apply. The case of Simpson v. Patten, 4 Johns. 422, came here on certiorari. Patten had sued Simpson in the court below on a promise, that if he, Patten, would forbear to sue one J. S., Simpson would pay the amount of J. S.'s note, as soon as he could sell an acre of land of J. S., which he, Simpson, was authorized to sell. Simpson had sold the land, and a recovery was had on the parol promise. This court reversed the judgment, saying that a promise to pay the debt of a third person must be in writing, notwithstanding it is made on sufficient consideration. They said nothing about this promise being an original undertaking. In support of their opinion they cite some of the above cases, and King v. Wilson, 2 Str. 873, where Raymond, C. J., held that a parol promise to pay the debt of another, in consideration of forbearance, was void by the statute of frauds and perjuries. In the cases of Simpson v. Patten and Jackson v. Rayner there was a good consideration, that of indefinite forbearance, and in both cases funds of the original debtor were placed in the hands of the defendants, by which they had the means of performing their promises; but the original debt was still subsisting. The case of Slingerland v. Morse, 7 Johns. 463, was very much like the case of Williams v. Leper. The plaintiff had distrained the goods of his tenant, and the defendants promised in writing to deliver them six days after demand, or pay $450. It was contended that the writing should have contained a consideration according to Sears v. Brink, 3 Johns. 210, 3 Am. Dec. 475, considering the case as within Chief Judge Kent's second class; but the undertaking was held to be original. The plaintiff had a lien which he relinquished; and as this took the case out of the statute, no writing was necessary. Skelton v. Brewster, 8 Johns. 376, came here on certiorari. Brewster had levied on the property of one W. S. by virtue of an execution. W. S. delivered all his goods to Skelton, who, in consideration of this, and that the plaintiff would discharge W. S. from the execution, promised to pay $25. In this case the court said: "The promise of the defendant below to pay the judgment against a third person, was founded on a new and distinct consideration, which was the delivery of the goods of such person, and

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the plaintiff's discharge of the judgment"—and they held it an original promise. This case differs from Simpson v. Patten and Jackson v. Rayner in no essential particular, except that, in those cases, the original debtor remained liable. In this case he was discharged. In those cases the promises were held to be within the statute; in this, not. It would seem, therefore, that the liability of the original debtor was a controlling fact.

But in Gold & Sill v. Philips, 10 Johns. 412, the liability of the original debtor was overlooked, or not deemed important. In that case the plaintiffs had a demand against one Aaron Wood. Wood sold his farm to the defendants, and they agreed to pay Wood a certain sum. The rest of the consideration was composed of Wood's debts, which the defendants agreed to pay; and among them was the demand of the plaintiffs. The defendants wrote to the plaintiffs as follows: "Gentlemen: An arrangement has been made between us and Aaron Wood, by which we are to be accountable to you for the balance due from him to you, on account." The court say: "The promise of the defendants was not within the statute of frauds. It had no immediate connection with the original contract, but was founded on a new and distinct consideration. The distinction noticed in Leonard v. Vredenburgh applies to this case, and takes it out of the statute. The defendants made the promise in consideration of a sale of lands made to them by Wood; and they assumed to pay the debt of the plaintiffs, as being, by arrangement with Wood, part payment of the purchase money. Here was a valid assumption of the debt of Aaron Wood." In this case the original debtor was not discharged, and the property purchased of Wood had passed to another person who had made a similar promise. In the case of Myers v. Morse, 15 Johns. 425, the plaintiffs were liable as indorsers of one H. M. They also held a note drawn by H. M. and indorsed by the defendant, on which he was liable. It was agreed by the plaintiffs that they would not hold the defendant liable on the note held by them, in consideration whereof he promised to indemnify the plaintiffs against one-third of any loss which they might sustain as indorsers of H. M. This was held to be an original promise, founded upon the new consideration moving between the newly contracting parties. The case of Olmstead v. Greenly, 18 Johns. 12, was this: The plaintiff was liable as indorser for B. & H. for $1,000. B. owed the plaintiff $150, and it was agreed between the plaintiff, defendant and B., that B. should place in the defendant's hands, in cash, $600, and in goods, $1,500, and that the defendant should pay the note indorsed by the plaintiff, and indemnify him against all damages and costs by reason of that indorsement, and should also pay the plaintiff the debt due him from B. The plaintiff averred that B. had the money and goods, and that the plaintiff caused them to be put in the defendant's hands for the purposes mentioned. The court said this is not a case within the statute of frauds. It is not a mere collateral undertaking, on the part of the

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defendant, to pay the debt of Bristol, but was an original contract on an independent consideration, received by the defendant by the procurement of the plaintiff. The plaintiff has the same ground of action, as if he had delivered his own goods to the defendant as the consideration of the promise.

These cases do not entirely agree, unless they are distinguishable by the circumstance that in some of them forbearance to sue the original debtor is the whole, or a principal part, of the consideration for the promise, and in the others, the whole consideration is something new, moving to the party making the promise. Thus, in Simpson v. Patten and Jackson v. Rayner, the promise was founded, as well upon the forbearance of the plaintiffs to sue the original debtor, as upon the property of the debtor being placed in the hands of the defendants, out of which the debts might be paid; but in the cases of Gold v. Philips, Myers v. Morse, and Olmstead v. Greenly, no allusion is had to the effect to be produced upon the original debtor. The promise in those cases was predicated upon the value received by the defendants, either from the plaintiffs or the original debtor.

The case under consideration is, in principle, very much like the case of Gold v. Philips. The defendant had, in that case, purchased land of the original debtor, which was the consideration moving to the defendant. In this the defendant purchased hay, which was the consideration moving to him. So, too, Olmstead v. Greenly. The original debtor placed money and goods in the defendant's hands, with which he promised to make certain payments, and to pay the plaintiff's debt. It was averred that this was done by the procurement of the plaintiff, which is the only difference between that case and this, if the hay was not absolutely sold by Moon to the defendant. In all these cases, founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery.

I am, therefore, of opinion, that the court below erred, that the judgment be reversed, and a venire de novo awarded.

Judgment reversed.[40]

[40] The following cases (in none of which was there a novation) are in accord with the principal case: Ellwood v. Monk, 5 Wend. 235 (1830). See Barker v. Bucklin, 2 Denio, 45, 43 Am. Dec. 726 (1846); Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521 (1870). Compare Bank v. Chalmers, 144 N. Y. 432, 39 N. E. 331 (1895); Huber v. Ely, 45 Barb. 169 (1865); Smart v. Smart, 97 N. Y. 559 (1885), assignment of lease and sale of stock of goods; Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516 (1895), goods; Thorp v. Keokuk, etc., Co., 48 N. Y. 253 (1872), land; Seaman v. Hasbrouck, 35 Barb. 151 (1861), land; Townsend v. Long, 77 Pa. 143, 18 Am. Rep. 438 (1875); Taylor v. Preston, 79 Pa. 436 (1876), land; Wynn's Adm'r v. Wood, 97 Pa. 216 (1881), stock in trade; Hall v. Lincoln Savings, etc., Co., 220 Pa. 485, 69 Atl. 994 (1908), money; Arnold v. Stedman, 45 Pa. 186 (1863), abandonment of lien on realty; Stoudt v. Hine, 45 Pa. 30 (1863); Dearborn v. Parks, 5 Me. 81, 17 Am. Dec. 206 (1827), land; Maxwell v. Haynes, 41 Me. 559 (1856), "fixings" in the woods; Brown v. Strait, 19 Ill. 88 (1857), mill; Rabbermann v. Wiskamp,

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MASON v. HALL.

(Supreme Court of Alabama, 1857. 30 Ala. 599.)

Appeal from the Circuit Court of Monroe, tried before Hon. C. W. Rapier.

The complaint in this case was in these words:

"Lucy H. Mason v. Thomas Hall.

"The plaintiff claims of the defendant $155, due for the hire of a negro man, named Ambrose, for the year 1854, which sum of money, with interest thereon, is now due."

"On the trial," as the bill of exceptions states, "the plaintiff introduced proof to show that, on 1st January, 1854, she hired a negro man to James Hall for the term of one year, for $155, and took from him a note, with security, for said sum of money. It was proved, also, that said James Hall, early in the year 1854, hired said slave to de-

54 Ill. 179 (1870), contract assigned to defendant; Wilson v. Bevans, 58 Ill. 232 (1871), personalty and interest in a lease of a farm; Mathers v. Carter, 7 Ill. App. 225 (1880), surrender of the defendants' bond to the defendants: Woodward v. Wilcox, 27 Ind. 207 (1866); Johnson v. Knapp, 36 Iowa, 616 (1873), horses; Chamberlin v. Ingalls, 38 Iowa, 300 (1874), land; Botkin v. Middlesborough, etc., Co., 23 Ky. Law Rep. 1964, 66 S. W. 747 (1902), land: Small v. Schaefer, 24 Md. 143 (1866), bonds; Wag. St. Mo. p. 1000, § 3; Besshears v. Rowe, 46 Mo. 501 (1870), land; Beardslee v. Morguer, 4 Mo. App. 139 (1877); Keyes v. Allen, 65 Vt. 667, 27 Atl. 319 (1893), chattel mortgage, the court saying that the transaction is "an independent undertaking, notwithstanding the continuance of the original liability"; Sweatman v. Parker, 49 Miss. 19 (1873), notes of a third person indorsed to defendant, the promise being made to the plaintiff, but the court saying, obiter, that the same result would follow, though the promise were made to the indorser; Emerson v. Slater, 63 U. S. 28, 16 L. Ed. 360 (1859), real estate and bonds; Putney v. Farnham, 27 Wis. 187, 9 Am. Rep. 459 (1870), personalty; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946 (1906); Plano Mfg. Co. v. Burrows, 40 Kan. 361, 19 Pac. 809 (1888), harvesting machine; Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 937 (1889), land.

By the terms of the bailment the defendant may agree to pay a given sum to the plaintiff at all events. The defendant is then a debtor. Whitcomb v. Kephart, 50 Pa. 85 (1865); Clay v. Tyson, 19 Neb. 530, 26 N. W. 240 (1886), wherein the court says: "The agreement * * * made with the son was a new and independent contract, based upon a valuable consideration, by which plaintiff in error created a new debt, which he agreed to pay, not to the son, his original creditor, but to defendant in error. * * * It then became a debt, * * * and was not within the statute of frauds."

A discussion of the English cases will be found in the author's paper: "A New and Old Reading on the Fourth Section of the Statute of Frauds," University of Pennsylvania Law Review, and American Law Register, vol. 57, pp. 611–634 (1909).

The author has elsewhere traced the history of the action of account in favor of the beneficiary under a contract. See "History of the Beneficiary's Action in Assumpsit," Select Essays in Anglo-American Legal History, vol. 3, p. 339; also American Law Register, vol. 47 O. S. (56 N. S.) pp. 73–87.

In Dearborn v. Parks, 5 Me. 81, 17 Am. Dec. 206 (1827), the Supreme Judicial Court of Maine said: "In cases of this description, although the promisor undertakes to pay the debt of another, yet he thereby pays his own debt; and that constitutes the operative motive and inducement, by which he is actuated. To him it must be a matter of indifference whether he pays directly to his creditor or to his assignee. He pays no more, and he can be holden to

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fendant, Thomas Hall, who was his father; that defendant agreed with said James Hall that he would pay plaintiff the hire of said negro, to wit, $150, and that said James Hall would pay $5 of the hire; that the plaintiff still held the note of said James Hall; and that said James Hall had left the country in the early part of the year 1854. There was no evidence that plaintiff had offered to give up the note of said James Hall to any person. This was, in substance, all the evidence; and upon this state of facts the court charged the jury that the plaintiff could not recover, as the promise to pay the hire was not made to her, and accepted by her, and the note of James Hall delivered up." The plaintiff excepted to this charge, and was compelled to take a nonsuit, which she now moves to set aside, assigning the charge of the court as error.

WALKER, J. There are three questions in this case: (1) Whether a promise by one to pay the debt of another, made upon a new and valuable consideration beneficial to the promisor, is within the statute

pay but once. These are not cases within the meaning of the statute, which requires evidence, not susceptible of being easily perverted by fraud or perjury, before one man can be held obliged to pay the debt of another and trust to his solvency for reimbursement. But if the original debtor has paid him an adequate consideration therefor, either by the discharge of a debt due to himself, or by depositing money with him for the express purpose, and the party thereupon promises to pay as directed, why should not the undertaking inure to him for whose benefit it is intended? As this cannot operate to the injury of the promisor, there is no reason why the law should require evidence of a more certain character to prove the substitution than to prove the promise directly to him from whom the consideration moved. We are therefore of opinion that this is not a case within the statute of frauds, and that, according to the authorities, the alleged want of privity constitutes no sufficient objection to a recovery on the part of the plaintiff."

In Taylor v. Preston, 79 Pa. 436 (1876), the Supreme Court of Pennsylvania said: "Is the contract here alleged within the prohibition of the statute of frauds of the 26th of April, 1855? It is to be borne in mind that the defendants were acquiring property for their own use. They were contracting to serve the purposes, not of the plaintiff, but of themselves. And the agreement, if it was made, to pay Young, was not only a stipulation to pay a debt which Preston owed, but a stipulation to pay the price of property they had bought. In no ordinary sense did they become sureties or guarantors for Preston. Buying the land, the promise to pay for it, whatever the form, was a promise to pay their own debt. To hold the statute applicable to a case like this, it is believed, would be both a violation of principle and a departure from authority."

Contra: Emerick v. Sanders, 1 Wis. 77 (1853); Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741 (1834); Lang v. Henry, 54 N. H. 57 (1873), containing the dictum that if a demand precedes the suit recovery may be had, but not otherwise; Palmetto Mfg. Co. v. Parker, 123 Ga. 798, 51 S. E. 714 (1905); Strauss v. Garrett, 101 Ga. 307, 28 S. E. 850 (1897), under a peculiar provision of Georgia's Code 1895, §§ 2693, 2694, making the statute inoperative in cases "where there has been performance on one side, accepted by the other in accordance with the contract"; Furbish v. Goodnow, 98 Mass. 296 (1867).

The last case is adversely criticised in Browne on the Statute of Frauds (5th Ed.) § 214. Curtis v. Brown, 5 Cush. (Mass.) 488 (1850); Brightman v. Hicks, 108 Mass. 246 (1871). But see the early Massachusetts cases: Carnegie v. Morrison, 2 Metc. 381 (1841); Brewer v. Dyer, 7 Cush. 340 (1851). See, also, Clapp v. Lawton, 31 Conn. 95 (1862); Halstead v. Francis, 31 Mich. 113 (1875); Styron v. Bell, 53 N. C. 222 (1860).

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of frauds; (2) whether a suit can be maintained upon such a promise by him for whose benefit it was made; (3) whether, if suit can be maintained upon such a promise, the declaration may be upon the promise made to the plaintiff's debtor, describing it as if it had been made to himself.

The first of those three questions is clearly settled in the negative by the previous decisions of this court. McKenzie v. Jackson, 4 Ala. 230; Brown v. Barnes, 6 Ala. 694; Martin v. Black, 21 Ala. 721; Hollingsworth v. Martin, 23 Ala. 591; Cameron v. Clarke & Smith, 11 Ala. 259.

Upon the second question there is some conflict of authority; but the weight of authority, both in England and America, is decidedly in favor of the proposition that, where a parol promise is made to one for the benefit of another, an action may be maintained upon it by him for whose benefit it was made. Such, upon the authorities, and upon the reason, convenience, and justice of the rule, we think is the law. It is no objection to the maintenance of the suit by him for whose benefit the promise is made that an action might also be brought by him to whom the promise was made. We deem it only necessary to cite the authorities in support of the foregoing proposition. Bell v. Chaplain, Hardres, 321; Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154; 1 Comyn's Digest, 303; 1 Chitty on Pleading, 5; Barker v. Bucklin, 2 Denio (N. Y.) 45, 13 Am. Dec. 726; Master, Wardens, and Commonalty of Feltmakers v. Davis, 1 Bos. & Pul. 98; 4 Am. Jurist, No. 43, October, 1839, pp. 16 to 20; Hitchcock v. Lukens, 8 Port. 333; Hall v. Marston, 17 Mass. 575; Carey v. Evans, 29 Ala. 99; Huckabee v. May, 14 Ala. 263; Hoyt, Ford & Robinson v. Murphy, 18 Ala. 316.

Upon the third question we are constrained to decide against the appellant. Where a promise is made by one person to pay the debt of another, it is necessary to declare specially, unless the case be one in which the action for money had and received can be maintained. Mason v. Munger, 5 Hill (N. Y.) 613; Beers v. Culver, 1 Hill (N. Y.) 589; Quin v. Hanford, 1 Hill (N. Y.) 82; Huckabee v. May, 14 Ala. 263. The complaint is upon a hiring by the plaintiff to the defendant. The cause of action is a promise, in consideration of a hiring by a third person, to pay a debt of such third person to the plaintiff. There was no hiring by the plaintiff to the defendant. There is a fatal variance between the complaint and proof. For this reason we cannot avoid holding that the charge of the court below is free from error, though it is manifest from the facts before us that the plaintiff has a just and legal cause of action against the defendant.

The judgment of the court below is affirmed.

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WRIGHT v. SMITH.

(Supreme Court of Appeals of Virginia, 1886. 81 Va. 777.)

Error to judgment of hustings court of Petersburg, rendered July 30, 1884, in an action of trespass on the case in assumpsit, wherein W. D. Smith was plaintiff and C. Wright & Son were defendants. With the declaration was filed an account of items, whereof the first was as follows: "September 15, 1881. To amount admitted by C. Wright, trading as C. Wright & Son, as payable by him to W. D. Smith, as a settlement had between them this day, $998.99." Smith had been partner in trade with F. H. Wright. Upon dissolution of firm, September 15, 1881, it owed him $998.99. C. Wright & Son bought the firm's goods and promised to pay this sum to Smith, giving their note at Smith's request, to "Mrs. W. D. Smith." The money put into the firm by Smith was held by him as his homestead, and he testified that the note was made payable to his wife under a mistake as to the legal ownership of the fund. The note never was delivered to or known of by her. It was lost and included in the account, and the facts connected with set forth therein. Wright demurred to the declaration. His demurrer was overruled. There was verdict for Smith and judgment accordingly, to which Wright obtained a writ of error and supersedeas.

LEWIS, P., delivered the opinion of the court.[41] * * *

It appears from the evidence of the plaintiff that the promise was founded on a new and original consideration, namely, the stock of goods belonging to the firm of which the defendant became the purchaser, and hence is not within the statute of frauds. Tindal v. Touchberry, 3 Strob. (S. C.) 177, 49 Am. Dec. 637; Cooper v. Chambers, 15 N. C. 261, 25 Am. Dec. 710; Hopkins, Brother & Co. v. Richardson, 9 Grat. 485, 494.

LACY and FAUNTLEROY, JJ., dissented.[42]

Judgment affirmed.

BERRY v. DOREMUS.

(Supreme Court of New Jersey, 1863. 30 N. J. Law, 399.)

In assumpsit. On case stated for advisory opinion of this court.

James Mead, in 1849, sold a house and lot, in New York, to Jacob G. Doremus, the defendant, for $5,000; and the said defendant thereupon, and in part consideration of the purchase, promised the said Mead that he would pay to Hannah Ryerson, the plaintiff's intes-

[41] The opinion is reprinted only so far as it deals with the statute.

[42] There were other questions in the case, and the ground of dissent is not given.

Accord: Skinker v. Armstrong, 86 Va. 1011, 11 S. E. 977 (1890). But compare Noyes' Ex'r v. Humphreys, 11 Grat. 636 (1854).

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tate, to whom he was indebted for board, the sum of $100 per annum, after the death of said Mead, so long as the said Hannah Ryerson should live. Jacob Mead died in 1849, and Hannah Ryerson in 1857. After the death of Hannah, her administrator, Henry H. Berry, brought this action to recover the amount due on said promise.

On the trial at the Morris circuit, the plaintiff having rested his cause, the defendant moved to nonsuit on six several grounds, as stated below in the opinion of the court.[43] The nonsuit was granted, and the circuit court certified the case to this court for their advisory opinion, whether the nonsuit was rightly granted upon any of the grounds taken.

VREDENBURGH, J. This is an action of assumpsit, brought by the plaintiff against the defendant, upon a promise alleged to have been made by the defendant to the plaintiff's intestate, on the 2d day of April, 1849, by which the defendant, in consideration of a sale to him, by one James Mead, of the house and lot No. 33 Leonard street, in the city of New York, at the price of $5,000, promised Mead to pay the said intestate, as part of the said purchase money, $100 a year, after said Mead's death, during her natural life. The plaintiff, on the trial, proved the execution and delivery of the deed for the said premises by Mead to the defendant, on the said 2d day of April, 1849, the promise to Mead, by the defendant, to pay the intestate, as before stated, in consideration of board owing by Mead to her, the death of Mead, on the 5th of April, 1849, and the death of the intestate, on the 13th February, 1858.

The plaintiff thereupon rested; whereupon the defendant moved for a nonsuit, upon the following grounds:

Because it is an agreement to pay the debt of another, and not in writing, and void under the statute of frauds. * * *

Because it was an attempt to create a trust, and not being in writing, is void by the statute of frauds. * * *

The fourth ground assigned for granting the nonsuit was, because the agreement of the defendant was to pay the debt of another person, and not in writing, and so void under the statute of frauds. But this agreement of the defendant was evidently not one to pay the debt of another. It was an agreement to pay his own debt. He, by taking the deed, became indebted to the grantor, and his agreement was to pay a part of his indebtedness to the grantor, to his order or appointee. It was the same, in legal effect, as agreeing to pay so much of the consideration of the deed to the grantor himself. By so doing he was not paying the debt of Mead, but his own debt to Mead. * * *

The sixth ground urged for a nonsuit was because it was an attempt to create a trust, and not being in writing, is void by the stat-

[43] Only so much of the opinion is here printed as relates to the statute of frauds.

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ute of frauds. But I cannot see what trust was here attempted to be created. It was an ordinary deed of bargain and sale for the consideration therein expressed. The defendant agreed to pay the consideration as the grantor prescribed. The grantee assents to the terms of payment, among which was the agreement to pay part of the consideration money to the intestate, in place of paying it to the grantor himself. There was no more trust created in agreeing to pay the intestate than in agreeing to pay the grantor himself. There was no other trust than there always is between the vendor and vendee, when the vendee agrees to pay the consideration at a future time, or in the vendee agreeing to pay the vendor for a pound of sugar the next day. The agreeing to pay part of the consideration to the intestate was the same, in legal effect, as agreeing to pay the grantor. The whole upshot of the matter was that the defendant owed Mead for land sold, and agreed with Mead to pay off the purchase money to his order, instead of to himself. There was no such trust as required to be in writing by the statute of frauds. I see no reason to grant a nonsuit upon any of the grounds urged upon the circuit court, and think that the court should be advised accordingly.

OGDEN and VAN DYKE, Justices, concurred.

VI. ACTIONS FOR FALSE REPRESENTATIONS AS TO CREDIT OF ANOTHER

UPTON v. VAIL.

(Supreme Court of New York, 1810. 6 Johns. 181, 5 Am. Dec. 210.)

This cause came before the court, on certiorari, from a justice's court. The suit below was a special action on the case against Upton, for "falsely and deceitfully" recommending one Daniel Brown, Jr., to Vail, as a man of property, whereby Vail was induced to give credit to Brown, and, afterwards, lost his debt. The facts as they appeared before the justice, upon the trial, were, as follows: Upton had a judgment bond against Brown, bearing date the 5th of March, 1808, and conditioned to pay $550. On the 10th of March, 1808, he went with Brown to the house of Vail, where Brown applied for goods upon credit, and Vail asked Upton as to the solvency of Brown; and Upton said, he was good, and as good as any man in the county for that sum. Vail, accordingly, trusted him with goods, to the amount of $10, and took his note, payable the 1st of October following. On the 25th of March, 1808, Upton, caused an execution to be issued on his judgment, and took and sold all the property of Brown, and among which was the property that Brown had received of Vail, upon the credit above

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mentioned. This was confessed by Upton, who said that Brown had no property, and was worth nothing, and that he had taken the goods which Brown received of Vail, and had a right so to do, and would do so again. All this happened before Brown's note fell due. Upon these facts, the justice gave judgment against Upton.

The cause was submitted to the court without argument.

KENT, C. J., delivered the opinion of the court. Deceit, in the recommendation of Brown, was the gist of this action; it was a conclusion which the justice was to draw from the facts, and I think the facts did warrant that conclusion. There is no cause to disturb the judgment below, on the ground that it is not supported by proof. The judgment of the justice was here a substitute for the verdict of a jury, and the facts would well have justified a jury to have drawn the inference of a premeditated fraud. But one of the points stated on the part of the plaintiff is that this action will not lie at all, without the showing some note, or memorandum in writing, to charge the party; and this objection was made at the trial below.

We have never expressly decided in this court that the action would lie. In Ward v. Center, 3 Johns. 271, the question was incidentally raised, but no opinion expressed by the court, because the motion, in that case, was for a new trial, and not in arrest of judgment. The case of Paisley v. Freeman, decided in the King's Bench so late as the year 1789 (3 Term Rep. 51), is the first direct authority, in the English courts, in support of the action. I have carefully examined the reasoning of the judges in that case, and in the subsequent cases, which go to question, or support the soundness of that decision; and I profess my approbation of the doctrine on which it was decided. The case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit accompanied with damage is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence. The only plausible objection to it is that, in its application to this case, it comes within the mischiefs which gave rise to the statute of frauds, and that, therefore, the representation ought to be in writing. But this, I apprehend, is an objection arising from policy and expediency; for it is certain that the statute of frauds, as it now stands, has nothing to do with the case. The case of Paisley v. Freeman has received a decided sanction, by a succession of learned judges, in the several courts of Westminster Hall; and I observe that the action is sustained without contradiction in the courts in Connecticut. Eyre v. Dunsford, 1 East, 318; Haycraft v. Creasy, 2 East, 92; Tapp v. Lee, 3 Bos. & Pull. 367; Harnar v. Alexander, 5 Bos. & Pull. 241; 1 Campbell's N. P. 4, 277; Wise v. Wilcox, 1 Day's Cases in Error, 22.

In one of the cases, Sir James Mansfield says: "I am far from wishing to sustain an action simply upon misrepresentation; but there never was a time in the English law where an action might not have been maintained against the defendant for this gross fraud." Lord

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Eldon has, indeed, expressed his dissatisfaction with the case of Paisley v. Freeman; and he thought that the statute of frauds and perjuries ought to be applied to the case. Evans v. Bicknell, 6 Ves. Jr. 186. He is, undoubtedly, a very respectable authority; but as far as mere authority goes the preponderance is vastly on the other side. The courts of law have been uniformly against him; and even his successor, Lord Erskine, has declared himself, in the strongest terms, in favor of the suit. "As to the danger from a single witness," he observes, "is not one sufficient for conviction of a capital crime? That objection goes to the very root of the law, which is uniform in principle and practice, with the single exception of the case of perjury, as there is oath against oath. The case of Paisley v. Freeman, therefore, stands upon the clearest principles of jurisprudence, and has no connection with the statute of frauds, which applies, where one man undertakes for the debt of another." 13 Ves. 133.

But independent of the English cases, I place my opinion upon the broad doctrine that fraud and damage, coupled together, will sustain an action. This is a principle of universal law, and I consider it as deserving of particular notice, and, in a question depending upon general principle, as adding no inconsiderable weight to the accumulation of authority, that the same doctrine is laid down by Pothier. Traité du Contrat de Mandat, art. 21. It is drawn by him from the text of the civil law, where it is supported by the sanction of Ulpian. Dig. 50, 17, 47. Consilii non fraudulenti nulla obligatio est, cæterum si dolus et calliditas intercessit, de dolo actio competit. "If," says Pothier, "you had only recommended Peter to his creditor as honest, and able to pay, this was but advice, and not any obligation; and if Peter was, at the time, insolvent, you are not bound to indemnify the creditor for the sum which he loaned to Peter, by means of your advice, and which he has lost. Nemo ex consilio obligatur. The rule is the same, if the advice was given rashly and indiscreetly, without being duly informed of the circumstances of Peter, provided it was sincerely given. Liberum est cuique apud se explorare an expediat sibi consilium. But if the recommendation was made in bad faith, and with knowledge that Peter was insolvent, in this case you are bound to indemnify the creditor."

The court are, accordingly, of opinion, that the judgment below must be affirmed.

Judgment affirmed.[44]

[44] The leading case of Paisley v. Freeman, 3 Term Rep. 51 (1789), settled the law in favor of the action not being within the statute. To change this rule a statute was required. The statute (9 Geo. IV, c. 14, § 6, commonly known as Lord Tenterden's Act) provided as follows: "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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VII. Special Promise to Answer for the Miscarriage of Another Person

KIRKHAM v. MARTER.

(Court of King's Bench, 1819. 2 Barn. & Ald. 613.)

The declaration stated that one T. E. Marter, before the making of the promise of defendant, had, without the leave or license of the plaintiff, wrongfully ridden a horse of the plaintiff's, in consequence whereof the horse died; that the plaintiff had threatened to commence an action against the said T. E. M. for the recovery of such damages as plaintiff had sustained by reason of the premises; and thereupon, in consideration of the premises, and that the plaintiff, at the request of defendant, would not bring any action against the said T. E. M. for the cause aforesaid, and that plaintiff would be content to take, for and on account of the said horse, what should be agreed upon between the defendant and one A. B., defendant promised to pay plaintiff what should be agreed upon between defendant and said A. B. for and on account of said horse. Averment, that plaintiff had brought no action for the cause aforesaid, and that he was willing to take, for and on account of the horse, what had been agreed upon between the defendant and A. B., and that defendant and A. B. did agree that defendant should pay plaintiff 50 guineas for the said horse, and the bill due for the maintenance and keep of the said horse, and that the same should be paid before the then next Epsom races. Declaration then averred that that bill before the then next Epsom races was ascertained to amount to a certain sum therein mentioned. Breach, nonpayment of the said several sums. Plea, general issue.

The cause was tried on Thursday, 13th May, at the second Middlesex sittings in this term, before Abbott, C. J., when the plaintiff proved a verbal contract as laid in the declaration. Abbott, C. J., thought this an undertaking for the default or miscarriage of another, within the statute of frauds, and consequently, that the promise ought to have been in writing, and the plaintiff was nonsuited. The distringas was returnable on Monday, the 17th. The motion for a new trial was made on the 21st; and although more than four days had elapsed since the trial, the court agreed, after consulting with the master, that such a motion might be made at any time within four days after the return of the distringas.[45]

Abbott, C. J. This case is clearly within the mischief intended to be remedied by the statute of frauds, that mischief being the frequent fraudulent practices which were too commonly endeavored to be upheld by perjury; and if it be within the mischief, I think the words of the statute are sufficiently large to comprehend the case.

[45] The arguments of counsel are omitted.

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The words are these: "No action shall be brought to charge a defendant upon any special promise to answer for the debt, default, or miscarriage of another person." Now the word "miscarriage" has not the same meaning as the word "debt" or "default." It seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages, and, therefore, in my judgment, falls within the meaning of the word "miscarriage." The Case of Read and Nash is very distinguishable from this. The promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault, brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original, and not a collateral, promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son. I therefore think that the nonsuit was right.

HOLROYD, J. I am also of opinion that the nonsuit in this case was right. I think the term "miscarriage" is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract; for in the latter case the ground of action is that the party has not performed what he agreed to perform, not that he has misconducted himself in some matter for which by law he is liable. And I think that both the words "miscarriage" and "default" apply to a promise to answer for another with respect to the nonperformance of a duty, though not founded upon a contract. This case is certainly within the mischief contemplated by the Legislature, and it appears to me to be within the plain, intelligible import of the words of the act of Parliament.

BEST, J. It appears to me that this case is within the spirit and principle as well as the words of the act. The principle of the act is this: That where a man undertakes to do something which by law he is not bound to perform, it shall be reduced to writing. Here the defendant does undertake to do something that by law he is not bound to do. It is not reduced to writing, and, therefore, that brings it within the spirit of the act. The question is, whether the words of the act are large enough to embrace this case. There is nothing to restrain these words "default" or "miscarriage"; and it appears to me that each of them is large enough to comprehend this case.

Rule refused.

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SECTION 2.—DISTINCTION BETWEEN SURETYSHIP AND GUARANTY

KEARNES v. MONTGOMERY.

(Court of Appeals of West Virginia, 1870. 4 W. Va. 29.)

This action arose in Greenbrier county, in February, 1867. Kearnes was the plaintiff below, and brought the case here on a writ of supersedeas. All the facts certified in the bill of exceptions, are given in the opinion of Judge MAXWELL.

Hon. N. Harrison, judge of the circuit court of Greenbrier, presided on the trial of the case.[46]

MAXWELL, J. This is an action of assumpsit, to recover from the defendant the sum of $2,000, with interest. The facts certified show that, on the 28th day of January, 1860, the plaintiff held the bond of the defendant and one J. N. Montgomery, for $2,000; that the defendant, on the day and year aforesaid, proposed to exchange with the plaintiff, for the said bond, a bond of $2,000 executed by Thomas Creigh and L. S. Creigh to the plaintiff; that the plaintiff refused to accept the said last-mentioned bond unless the defendant would indorse the same, inasmuch as it was payable to the plaintiff, and not to the defendant, whereupon the said defendant wrote his name upon the back of the said bond, which was then accepted by the plaintiff, who in exchange therefor delivered to the defendant the said bond of the defendant and J. N. Montgomery; that afterwards, and after the institution of the suit, but before the trial, the plaintiff wrote above the blank indorsement of the defendant a promise binding the defendant as surety of the said Thomas Creigh and L. S. Creigh; that the bond, with the indorsement thereon, is as follows:

"On or before the first of March, 1861, with interest from the first of March, 1860, we or either of us bind ourselves, our heirs, etc., to pay Alexander Kearnes the just and full sum of two thousand dollars, for value received. Witness our hands and seals, this 28th day of January, 1860. Thomas Creigh. [Seal.]

"Lewis S. Creigh. [Seal.]"

"For value received, I hereby become the surety of Thomas Creigh and Lewis S. Creigh as obligors in the within bond.

"Wm. H. Montgomery."

That the debt against the Creighs could have been made by suit in the year 1861, and after the close of the war in 1865, and that the said Creighs have been insolvent since 1866, and that since that time the debt could not have been made off of them by suit. Upon these facts,

[46] The arguments of counsel are omitted.

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judgment was rendered for the defendant. The plaintiff in error insists that the judgment is erroneous, because upon the facts proved the defendant was a surety or maker of the bond in question, and primarily liable for its payment; while it is insisted for the defendant that he was guarantor merely, and only liable for the payment of the bond in case the money could not be made off of the makers of the paper after it fell due, by the use of due diligence, which he insists was not used before the makers became insolvent.

Whether the defendant is guarantor or maker depends on the understanding of the parties. If the payee or assignee of paper, not negotiable, indorse his name in blank on the back of it, he is prima facie assignor; but if a stranger indorse his name in blank on the back of paper, not negotiable, he is prima facie guarantor, but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred.

The contract of a guarantor is collateral and secondary. It differs in that respect generally from the contract of a surety which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default. As the proper diligence was not used against the Creighs, if the defendant is guarantor merely, he is not liable for the payment of the debt, while, if he is to be treated as surety, he is liable. It becomes, therefore, necessary to determine whether he is a technical guarantor merely, or a surety.

If the paper signed by the Creighs had been payable to the defendant, then the defendant would have been the assignor thereof. with the rights and liabilities of an assignor, unless some special agreement existed to create a different relation; and as the paper is payable to the plaintiff, the defendant is guarantor thereof, unless by some special agreement he is liable as maker or surety.

The plaintiff, after suit brought, wrote over the name of the defendant: "For value received, I hereby become the surety of Thomas Creigh and Lewis S. Creigh, as obligors in the within bond." It is upon this contract, so written by the plaintiff, that he claims his right to recover from the defendant. The plaintiff might write anything over the name of the defendant, consistent with the contract of the defendant, so as to carry it out. He could not write the words which he did write, unless upon special contract between the parties, disclosed by the evidence and surrounding circumstances. The evidence, instead of sustaining and authorizing this special contract as written by the plaintiff, does not even tend to show any such understanding, but, on the contrary, shows, so far as can be inferred from it, that the defendant was to assume the same situation as to liability that he would have occupied if the paper had been executed to him as payee and transferred by him to the plaintiff. As the facts proved wholly

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fail to show a contract on the part of the defendant to be liable as maker or surety, it follows that he is liable only as guarantor.

The facts proved show affirmatively that, by the use of due diligence against the Creighs, the plaintiff might have made the money.

The judgment complained of will, therefore, have to be affirmed, with damages and costs.

BROWN, President. The facts of this case show that it was the intention of the parties to change obligations, and that the liability of the defendant was thenceforth to be collateral only. Without attempting to reconcile or distinguish the numerous cases decided on the subject, the conclusion I deduce from them, as applicable to this case, is that the indorsement in blank of the single bill in question, by the defendant, made him collaterally liable as an assignor would have been after due diligence, and not primarily liable as claimed by the plaintiff.

I think, therefore, that the judgment should be affirmed, with costs and damages to the appellee.

BIRKSHIRE, J., concurred in the views of MAXWELL, J.

Judgment affirmed.[47]

[47] "The terms 'sureties' and 'guarantors' are often confounded, from the fact that a guarantor is, in common acceptation, a surety for another. The rules, however, of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant; and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible, and his contracts are often specialities; while the guarantor is only liable where default is made by the party whose undertaking is guaranteed, and his agreement is one of simple contract. A surety is not, as a matter of course, entitled to notice, and is not discharged by the insolvency of the principal debtor, for want of notice, although the principal was solvent when the debt became due. But in regard to a guarantor, if the debt is not paid at maturity by the principal, who is solvent at the time, the guarantor will be discharged if he has not received notice, if the principal shall have become insolvent. And as a general rule the guarantor is entitled to notice within a reasonable time; and he will also be discharged, in whole or in part, where he can show a direct injury resulting from want of notice." Hubbard, J., in Courtis v. Dennis, 7 Metc. (Mass.) 510, 518, 519 (1844).

Though American courts are uniformly committed to the difference in practical effect between a suretyship and a guaranty, yet there is no satisfactory or consistently adopted test for determining in all cases one kind of contract from the other.

The mere use of the word "guaranty" is not conclusive, for despite this term the intention may exist to become a surety. McIntosh Huntington Co. v. Reed (C. C.) 89 Fed. 464 (1898); Saint v. Wheeler & Co., 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210 (1891); Riddle v. Thompson, 104 Pa. 330 (1883).

"The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: That when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money, or do any other act, in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety

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HOFHEIMER et al. v. LOSEN.

(Kansas City Court of Appeals, Missouri, 1887. 24 Mo. App. 652.)

Appeal from Jackson Circuit Court; Hon. F. M. Black, Judge. Affirmed. The case is stated in the opinion.

ELLISON, J.[48] This was a suit begun before a justice of the peace, for a balance of $200 and interest, upon the following acceptance, to wit:

"$271.29. Quincy, Illinois, April 4, 1883.

"Four months after date pay to the order of ourselves, two hundred seventy-one 29/100 dollars, value received, and charge same to account of H. Hofheimer & Co.

"To John Schnarr, Security, B. Losen, Quincy, Ill."

is one who undertakes to pay if the debtor do not; a guarantor, if the debtor cannot. The first is sponsor, absolutely and directly, for the principal's acts; the latter, only for the principal's ability to do the act. 'The one is the insurer of the debt; the other, an insurer of the solvency of the debtor.' This is the essential distinction. There is another going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety. 'The contract of the guarantor in his own separate undertaking, in which the principal does not join.' Indeed, it has been held, permitting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter (McMillan v. Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323 [1869], s. c. 10 Am. Law Reg. 435, and notes), though we apprehend that a case might be put involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship." McClellan, J., in Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 371, 10 South. 539, 36 Am. St. Rep. 210 (1891).

The same test is recognized in Campbell v. Sherman, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735 (1892). Here a bond signed by one only, binding the obligor that a certain judgment shall be paid in full by the judgment debtor, was held to create a suretyship.

An unsatisfactory test has been advanced by making the determinant the joint or several form of the undertaking. Joint contracts or joint and several contracts at common law were contracts of suretyship and not of guaranty (as the word is now used in American decisions); but all several contracts were not contracts of guaranty, many being suretyships, e. g., promises of payment in consideration of forbearance towards a third person, who was the principal.

And see Campbell v. Sherman, 151 Pa. 70, 25 Atl. 35, 31 Am. St. Rep. 735 (1892). In Allen v. Hubert, 49 Pa. 259 (1865), the words, "I hereby agree to become security for the performance of the above agreement"—i. e., an agreement to pay rent—were held to be a direct and not a contingent engagement and hence (sic) a suretyship.

In Zahm v. First Nat. Bank of Lancaster, 103 Pa. 576 (1883), will be found some shadowy distinctions based on the phraseology of guaranties and suretyships on the back of commercial paper.

In some states by statute the surety cannot be sued until after suit against the principal. Boggs v. State, 46 Tex. 10 (1876).

[48] The arguments of counsel have been omitted, and only that part of the opinion has been printed which deals with the question of notice.

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Across the face of said draft was written the following:
"Accepted April 7th. John Schnarr.
"B. Losen, Security."

On the back of said acceptance is an indorsement in words and figures as follows, to wit:

"Amount of Acceptance.....$271.29
"August 20, 1883. By cash..... 71.29

"Balance .....$200.00"

Defendant did not file any answer or other formal pleading.

There was a judgment for defendant in the justice's court, from which an appeal was taken to the circuit court of Jackson county, Missouri. In said circuit court the case was tried by a jury. Defendant filed no formal or special pleadings in the circuit court. The pleadings were the same as in the justice court.

Plaintiffs obtained judgment, and defendant appeals. * * *

III. As a surety, defendant was not entitled to notice of nonpayment. I know of no reason why there may not be a surety for an acceptor. The undertaking of the surety here was joint with that of the acceptor. He is an original promisor. His promise is not collateral or dependent upon a distinct consideration from that of the acceptor. His contract is not that of a guarantor. But, if it was, it is not such a one as requires notice. As before stated, it is an absolute promise to pay the amount stipulated, and the creditor is not bound to use diligence or give notice of non-payment. "But, where the guaranty is that the creditor himself shall be able to collect the debt of some third person, then it is incumbent upon the creditor to use diligence, and to give reasonable notice of non-payment. This is in accordance with the long-established rule of the common law. If I undertake for the act of some third person, I am not entitled to notice of his default before suit brought; but if I undertake directly your act or success, I am entitled to notice of your failure, for this is a fact peculiarly within your knowledge." Train v. Jones, 11 Vt. 444; Peck v. Barney, 13 Vt. 93. To the same effect are the cases of Davis v. Jones, 61 Mo. 409, and Singer Mfg. Co. v. Hester, 71 Mo. 91.

We see nothing in the other objections presented requiring a reversal, and affirm the judgment. All concur.

COLBY v. FARWELL.

(Supreme Court of New Hampshire, 1901. 71 N. H. 83, 51 Atl. 254.)

Assumpsit, to recover upon a contract of guaranty. Trial by jury, and verdict for the plaintiff. Transferred from the May term, 1901, of the superior court by Peaslee, J.

The plaintiff's decedent owned a promissory note secured by a second mortgage of real estate in Minnesota, and indorsed as follows:

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"In consideration of one per cent. per annum, I hereby guarantee the final collection of the within note and coupons attached.

"George N. Farwell."

The real estate was found by the jury not to be of sufficient value to satisfy the first mortgage claim, and it was admitted that nothing could be collected from the maker of the plaintiff's note since its maturity—about two years before this suit was brought. The defendant demurred to the declaration, and moved for a nonsuit, upon the ground that the plaintiff must first proceed against the property and the maker of the note. The demurrer was overruled and the motion denied, subject to exception.

BLODGETT, C. J. The verdict of the jury closes the question as to the availability to the plaintiff of the mortgage security; and the utter insolvency of the maker of the guaranteed note being admitted, the sole question raised by the case is whether the plaintiff was bound to first proceed against the maker and the security as a condition precedent to the enforcement of the guarantor's liability. We are of opinion that he was not.

The guaranty sought to be enforced was one of collection, and as such it constituted an undertaking on the part of the guarantor to pay the mortgage debt, if, upon maturity, payment could not by reasonable diligence be obtained from the debtor or from the mortgage. So far the authorities are uniform, but what constitutes reasonable diligence in such a case is a question upon which the authorities are conflicting; it being held in some jurisdictions that such diligence requires the prosecution of the debtor and of the security to execution and return of nulla bona, and that his insolvency, or the worthlessness of the security, is no excuse for a failure to prosecute (Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Salt Springs Nat. Bank v. Sloan, 135 N. Y. 371, 32 N. E. 231; Bosman v. Akeley, 39 Mich. 710, 33 Am. Rep. 447; French v. Marsh, 29 Wis. 649; McNall v. Burrow, 33 Kan. 495, 496, 6 Pac. 897; Roberts v. Laughlin, 4 N. D. 167, 59 N. W. 967), while in other jurisdictions it is held that if the debtor be so utterly insolvent, or the security so obviously valueless, that an action against either would manifestly be fruitless, the holder of the guaranty may resort to a suit upon it without first instituting proceedings against the one or the other. Camden v. Doremus, 3 How. 515, 533, 11 L. Ed. 705; Gilligan v. Boardman, 29 Me. 79, 82; Dana v. Conant, 30 Vt. 246; Sanford v. Allen, 1 Cush. [Mass.] 473; Cady v. Sheldon, 38 Barb. [N. Y.] 103, 111, 112; McDoal v. Yeomans, 8 Watts [Pa.] 361; McClurg v. Fryer, 15 Pa. 293; Jones v. Ashford, 79 N. C. 172. 176; Stone v. Rockefeller, 29 Ohio St. 625; Brackett v. Rich, 23 Minn. 485, 23 Am. Rep. 703; Dewey v. Investment Co., 48 Minn. 130, 134, 50 N. W. 1032, 31 Am. St. Rep. 623; Fall v. Youmans, 67 Minn. 83, 69 N. W. 697, 64 Am. St. Rep. 390.

The latter doctrine we take to be the true one. "The law requires no man, in the pursuit of his rights, to do a vain and futile thing, useful

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to nobody, and hurtful to himself by the needless expense and trouble it would impose." McClurg v. Fryer, supra; Haven v. Haven, 69 N. H. 204, 205, 39 Atl. 972; Lyman v. Railroad, 66 N. H. 200, 203, 20 Atl. 976, 11 L. R. A. 364. See, also, Beebe v. Dudley, 26 N. H. 249, 59 Am. Dec. 341; Dearborn v. Sawyer, 59 N. H. 95, 97; Howland v. Currier, 69 N. H. 202, 203, 44 Atl. 106.

Exceptions overruled.

WALKER, J., did not sit. The others concurred.[49]

[49] The duty of the creditor in a contract of guaranty to exhaust his remedy against the principal before suing the guarantor seems to be imported from the civil law, where this duty (called "excussion") exists in favor of both sureties and guarantors unless the contract expressly waives beneficium excussionis.

The civil law cases, showing what is and what is not excussion, are perhaps useful analogies.

See Meyer v. Coetzee, 4 South African Republic Reports (Transvaal) 252 (1892); Bethlehem v. Lietsman, Cape of Good Hope Reports, 1908, p. 367.

The expression "guaranty of payment" is held to create a suretyship. "There is a plain distinction between a guaranty of payment and a guaranty of collection. 'The former is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may begin an action against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success.' Jones v. Ashford, 79 N. C. 173; Baylie's Sureties and Guarantors, 113." Jenkins v. Wilkinson, 107 N. C. 709, 12 S. E. 630, 22 Am. St. Rep. 911 (1890).

A "continuing guaranty" may be defined as a promise or obligation which covers any balance (within the limit specified) that may arise in a course of trading between the promisee and his principal debtor. In other words, the liability of the guarantor or surety is not terminated by the first credit given to the specified limit. The question is the ascertainment of the intent of the contracting parties.

"It has been conceded that all these cases must be decided, each on its own ground; and, therefore, it is useless to refer to the decisions, except for any principle, which may be incidentally laid down in them." Per Park, J., in Hargreave v. Smee, 6 Bing., at page 249 (1829).

"Bonds, etc., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid in their construction. And if there be sureties bound by them, and the meaning is doubtful, the construction is restricted, and made most favorable to the sureties. * * * On the other hand, letters of guarantee are (usually) written by merchants, rarely with caution and scarcely ever with precision; they refer in most cases, as in the present, to various circumstances, and extensive commercial dealings, in the briefest and most casual manner, without any regard to form, leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances and facts accompanying the transaction, without referring to which they could rarely be properly understood by merchants, or by courts of justice." Mr. Justice Catron in Bell et al. v. Bruen, 1 How., at page 186, 11 L. Ed. 89 (1843).

A number of instances of continuing guaranties are collected in 4 L. R. A. 343, 344.

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PART II

THE EQUITABLE AND LEGAL RIGHTS OF THE SURETY

CHAPTER I

THE SURETY'S EQUITY OF EXONERATION

SAUNDERS v. CHURCHILL & SMITH.

(High Court of Chancery, 1613. Toth. 181.)

Saunders contra Churchill and Smith, 10 & 11 Jac. li. A, fo. 664 and 728. The plaintiff being bound with the said Churchill's father for payment of money at a day which the plaintiff supposed the money had been paid accordingly, the money was not paid, the said Churchill the father dies three years after, upon whose death the obligee puts the bond in suit against the plaintiff, but in respect the bond was continued without the plaintiff's privity, and Churchill's son having a good estate from his father, was ordered, and the feoffees to whom the son had conveyed those lands in trust, was ordered to sell those lands for payment of the said Churchill's debts.[1]

LEE v. ROOK.

(High Court of Chancery, De Term. Pasch., 1730. Mos. 318.)

The defendant, whilst he was under age, borrowed several sums of money of Mr. Lee, and Mr. Lee and his wife joined in a fine, and mortgage of their estate to raise the money. The defendant, after he

[1] The earliest example of the equity of exoneration which has been noted is Sebastian Giglis v. Robert Welby, priest, vol. 1, Chancery Calendar, p. cxx, s. c. Ames' Cases on Suretyship, p. 583. The case is in the reign of Henry VII.

The reason for the equity of exoneration is stated by Lord Keeper North in Ranelaugh v. Hayes, 1 Vern. 190, s. c. 1 Eq. Abr. 79 (1683): "And he conceived it reasonable that Sir James Hayes should be decreed to clear the Earl of Ranelaugh from all these suits and incumbrances within some reasonable time. And he compared it to the case of a counter-bond, where al-

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came of age, promised to pay Mr. Lee what money he had received from him. Mr. Lee died, and the plaintiff his wife, as his executrix, brought a bill against the defendant Rook, to redeem and pay off the mortgage money. And at the hearing of this cause, two questions were made, Whether this was a proper bill? And whether the defendant, since the statute of frauds and perjuries, could be bound by this contract concerning lands, which was never put into writing?

MASTER OF THE ROLLS. The defendant, after he came of age, having promised to pay the money, this is to be considered as the case of a person of full age, and if I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him, and the covenant in the mortgage deed to pay the money, will bind the defendant, for the money being borrowed for him, it is his debt, and the testator of the plaintiff was only a nominal person, but since it does not appear what money the defendant received, the plaintiff by consent is to bring an indebitatus assumpsit, and the defendant is not to take advantage of the statute of limitations; and is to pay £120. to the plaintiff, admitted by his answer to have been received, and the bill is to be retained 'till after the trial.

BEARDMORE v. CRUTTENDEN.

(In Chancery, before Lord Thurlow, Hilary Term, 1791. Cooke, Bankr. Laws [8th Ed.] 232.)

Bill by surety in a bond against the obligee, who is a mere trustee, and his cestui que trust, to compel them to prove under the commission against the obligor. Injunction for want of an answer, and upon motion to dissolve it the defendants were ordered to prove upon plaintiff's bringing money into court.[2]

though the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hang over him."

[2] "The surety, however, has another right, viz., that, as soon as his obligation to pay is become absolute, he has a right in equity to be exonerated by his principal." Per Willes, J., in Bechervaise v. Lewis, L. R. 7 C. P. 377 (1872).

"But in late cases, provided there was no risk, delay, or expense, as in the case put, of the money in the next room, indemnifying against the consequences of risk, delay, and expense, the surety has a right to call upon the creditor to do the most he can for his benefit; and the latter cases have gone farther. It is now clear that, if the surety deposits the money and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and give the benefit of an assignment in that way." Lord Eldon, in Wright v. Simpson, 6 Ves. 734 (1802).

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In re BABCOCK.

(Circuit Court of the United States, First Circuit, 1844. 3 Story, 393, Fed. Cas. No. 696.)

This was a case in bankruptcy, adjourned into the Circuit Court from the District Court; the judge of the District Court being interested in the case.[3] * * *

STORY, Circuit Justice. The circumstances of the case, shortly stated, are these: Kendall (the creditor) is the holder of a bill of exchange, drawn by one Leonard, agent of the Dudley Manufacturing Company, payable to his own order, upon Babcock, the bankrupt, and accepted by him, and indorsed by Leonard to Kendall. It is admitted that Babcock is a mere accommodation acceptor, but that fact was not known to Kendall at the time of his taking the bill. The bill at its maturity was dishonored, and Kendall has proved his debt in bankruptcy against the estate of Babcock, and has also brought a suit against the Dudley Manufacturing Company as drawers, and attached property of the company in that suit. The assignee of Babcock by his petition now asks the court to order Kendall to proceed in said suit, and to levy his execution upon the property so attached, and to apply the proceeds in satisfaction of the bill of exchange, and that he may not be allowed any dividend on the estate of Babcock until he has first applied the property attached in extinguishment and satisfaction of his claim.

The argument in support of the prayer of petition turns upon this: That Babcock is but a surety for the debt, that the attachment is a security held by the creditor for the debt, and that, in equity, the surety has a right to require that the security shall be first applied in discharge of his liability pro tanto, before he is called upon to discharge his secondary obligation.

There is no doubt that a surety for a debt may in many cases be entitled to relief by requiring the creditor to proceed against the principal. But this is ordinarily limited to cases where his character as surety stands confessed upon the face of the instrument itself, and also where he offers to indemnify the creditor in his proceedings against the principal, and also offers to pay whatever the principal may fail to pay under those very proceedings. This is the common course, where the surety seeks, by a bill against the creditor and the principal, to compel the latter to exonerate the surety from losses which may otherwise be sustained by him by the delays and forbearance of the creditor in enforcing his debt. See 1 Story on Eq. Jurisp. § 327, and cases there cited; 2 Story on Eq. Jurisp. § 730, § 849. Upon a similar ground, if the creditor in the case of the bankruptcy of the principal has not proved his debt against him, but declines to do so, a court of

[3] The arguments of counsel are omitted, and also the statement of facts; the latter sufficiently appearing in the opinion.

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equity will, upon a bill filed by the surety, compel the creditor to prove his debt in bankruptcy, and give the surety the benefit thereof; but then, in such a case, the relief is granted upon the terms that the surety brings the amount due into court. Beardmore v. Cruttenden, 1 Cooke, Bank. Law, 211; 1 Deacon, Bank. Laws (Ed. 1827) p. 291; Ex parte Rushforth, 10 Ves. 409, 414; Wright v. Simpson, 4 Ves. 734. And if the creditor has himself already proved his debt in bankruptcy, the surety will have a right upon payment of the debt to stand in equity as substituted to the rights of the creditor, and will be entitled to the dividends.

But a person may be a surety so far as regards the principal, and yet not be entitled to hold that character in respect to the creditor. Thus, for example, in the case of a bill of exchange, an accommodation acceptor for the drawer is to be deemed the principal and primary debtor, as to the holder of the bill, and it will make no difference generally, in cases of this sort, whether he is known to be an accommodation acceptor or not; and yet, in respect to the drawer, he is to be treated to all intents and purposes as a mere surety. Ex parte Rayswicke, 2 P. Will. 89; Ex parte Marshal, 1 Atk. 129; Ex parte Mathews, 6 Ves. 283; Ex parte Atkinson, 1 Cooke, Bank. Laws, p. 210; Deacon, Bank. Laws, p. 253, 254; Id. (Ed. 1827) 291; Ex parte Rushforth, 10 Ves. 409, 414. So that it is not safe in all cases to reason that a person, who is in fact a surety quoad the principal, is to be treated as a surety throughout in regard to the creditor. That may and usually does turn upon very different considerations. See United States v. Cushman, 2 Sumn. 426, 436, Fed. Cas. No. 14,908; Berg v. Radcliffe, 6 Johns. Ch. (N. Y.) 302; Hollier v. Eyre, 9 Clarke & Fin. 145.

Now, upon the known principles of courts of equity, acting in bankruptcy, the holder of a bill of exchange is entitled to prove his debt in bankruptcy against the drawer, the payee, and the acceptor respectively, if they have all become bankrupts, and to take a dividend against the estates of each until he has been paid his full debt. If one of the parties only is bankrupt, the creditor is still entitled to proceed against the other at law, until he has obtained satisfaction. It makes no difference in the case whether the bill is an accommodation bill or not. This is sufficiently apparent from the cases of English v. Darley, 2 Bos. & Pull. 62; Ex parte Bank of Scotland, 19 Ves. 310; Ex parte Rushforth, 10 Ves. 410; Ex parte Reed, 3 Deac. & Chit. 481; and others cited in 1 Deacon, Bank. Laws (Ed. 1827) 239, 255.

In relation to the point of the creditor's having collected securities in his hands for the payment of the debt, it is doubtless true that sureties are entitled upon the discharge or payment of the debt by themselves to have the benefit of those securities. But in bankruptcy a distinction is taken between the case of a security given to a creditor by the bankrupt himself of his own property, and the case of a security of a

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third person transferred to the creditor by the bankrupt, or otherwise in his hands. In the former case the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent, and then he may prove for the residue of his debt which the security when sold does not discharge. In the latter case he may prove his debt in bankruptcy without surrendering the security of the third person which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, he does not take, under the bankruptcy and the security, more than the full amount of his debt. This distinction was maintained in Ex parte Bloxham, 6 Ves. 449, Ex parte Crossley, 3 Bro. Ch. 237, and Ex parte Parr, 18 Ves. 65.

From the principles which have been stated, admitting the attachment to be a security, and the bankrupt to be a mere accommodation acceptor, it is clear that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill, under his attachment, until he has recovered the full amount of his debt; for it is not a security given by the bankrupt of his own property, but is a security attained by the creditor against other parties to the bill by a proceeding in invitum. I give no opinion, what is the light in which this attachment is to be viewed in respect to the present parties—whether as a security or as a mere remedial process to enforce payment of the debt against the drawers. In either view, so far as the present petition is concerned, the result must be the same. The most that the assignee is entitled to is to have the aid of the court in having the attachment suit carried on to its proper conclusion, for the benefit of the bankrupt's estate as far as regards any surplus which shall remain after the creditor has received from the dividends in bankruptcy and under the attachment the full amount of his debt. The creditor is not bound to pursue the attachment suit at his own expense, unless he chooses so to do; but he is bound, if he does not choose to carry it on upon his own account, to allow the assignee to carry it on for the benefit of the bankrupt's estate at the expense thereof. If the attachment suit is proceeded in, and any money is received under it, the creditor will be entitled to receive so much thereof as, with the dividends received, will cover the full amount of his debt and costs; the surplus will belong to the estate of the bankrupt. If the creditor declines to proceed farther, all the future costs must be borne by the assignee. If the creditor chooses to proceed in the suit, the future costs in the suit must be borne by the creditor and the assignee, according to their respective interests in, or benefits derived from the suit.

What I shall order, therefore, upon the present petition, is that the creditor shall forthwith make his election whether he will proceed in the attachment suit upon his own account or not; that if he elects to proceed therein, then he shall be required to proceed therein under the order and discretion of the court, as it shall award from

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time to time; and that, if he shall obtain payment therein, and levy upon any property, he shall be entitled to receive from the proceeds, if sufficient, the full amount of his debt and costs, deducting therefrom the dividends received from the bankrupt's estate, and the surplus to be paid over to the assignee. If the creditor shall decline to proceed in the said suit, then he shall authorize and allow the same to be carried on by the assignee at the expense and for the benefit of the bankrupt's estate; and that out of the property or money which shall be obtained under and in virtue of the suit, he shall, after the expenses thereof are deducted, be entitled to receive the full amount of his debt, beyond the dividends received by him, out of the proceeds, if sufficient, and the surplus, if any, shall belong to the assignee for the benefit of the bankrupt's estate. And either party shall be at liberty to apply to the court from time to time for further directions in the premises.

ASCHERSON v. TREDEGAR DRY DOCK & WHARF CO., Limited.

(Court of Appeal, [1909] L. R. 2 Ch. 401, 78 L. J. R. Ch. 697.)

Action. By an agreement under hand, dated August 27, 1902, Edward Ascherson and four other directors of the defendant company gave the London City & Midland Bank, Limited, a joint and several guarantee to secure the overdraft from time to time on the defendant company's current account.

The guarantors' liability was limited to £20,000. and interest.

It was provided that "this guarantee shall be a continuing guarantee and in full force until three calendar months after each of us shall have given or sent you notice in writing under our respective hands of our intention to discontinue and determine the same."

Edward Ascherson died on June 24, 1908, having appointed the plaintiffs his executors. The bank heard of his death on June 30, 1908, and at once closed the old account with an overdraft of £17,219. and opened a new account for the defendant company under the continuing guarantee. The bank informed the defendant company of this change in the account, and obtained the names of the executors, to whom they gave formal notice of their liability under the guarantee, but they did not demand payment of the overdraft either from the defendant company or the guarantors. After certain intermediate correspondence between the various parties, the plaintiffs wrote on December 3, 1908, asking the bank to let them know the extent of their testator's liability at his death and how far it had been reduced by sums subsequently paid by the defendant company into the account. On December 5, 1908, the bank replied as follows: "The balance due to the bank on June 30 last, the date on which we received notice of the death of Mr. Edward Ascherson, was £17,219. On that day the

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account was stopped, and all transactions have gone through a new account since that date, so that our claim against the estate of the late Mr. Edward Ascherson is £17,219. with interest thereon from June 30 last."

The plaintiffs, being desirous of winding up their testator's estate, requested the defendant company to discharge this liability, and on their refusal brought this action against the defendant company for a declaration that the plaintiffs as executors of Edward Ascherson and his estate were entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company to the bank of the said sum of £17,219. with interest from June 30, 1908, or so much thereof as was now owing by the defendant company to the bank, and for an order for payment accordingly.[4]

SWINFEN EADY, J. (after stating the facts). The object of the present action is to compel the defendant company, the principal debtors, to pay off the amount owing by them to the bank and relieve and release the executors of the deceased.

The defendant company conceded that the form of the guarantee in the present case was indistinguishable from that in Coulthart v. Clementson, 5 Q. B. D. 42, where it was held that a guarantee in that form was revoked as to subsequent advances by notice of the guarantor's death; and the bank have acted upon that footing. They have drawn the line on June 30, 1908, when they received notice of the death; they then closed the old account and opened a fresh account with the defendant company as from that date.

It was admitted that the bank were entitled to do that, and were not bound to credit the closed account with the subsequent payments in so as, by the application of the rule in Clayton's Case, 1 Mer. 572, to relieve the deceased's estate, but were entitled to treat the £17,219. as still owing, for the purpose of the guarantee, with interest from June 30, 1908, in accordance with In re Sherry, 25 Ch. D. 692.

It was contended that until the guarantee had been determined and the overdraft called in no right of action accrued to the bank against the sureties, although, if the present accounts continued for more than six years, all claim against the deceased's estate would be barred by the Statutes of Limitation under the decision in Parr's Banking Co. v. Yates [1898] 2 Q. B. 460.

That contention is not well founded. Repayment of the overdraft may be enforced by the bank at any time; there is no evidence of any contract binding the bank to allow an overdraft, for any definite time, or at all. In my opinion the true position is this. The bank have a present right of action against the executors of Edward Ascherson for the £17,219. owing on June 30, 1908, with subsequent interest, and have claimed that amount by their letter of December 5, 1908.

It has been the law of the Court for very many years that a surety

[4] The arguments of counsel are omitted.

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is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved.

In Ranelaugh v. Hayes, 1 Vern. 189, the Lord Keeper "compared it to the case of a counter-bond, where although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the principal"—that is, the principal debtor—"to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him." Then in Nisbet v. Smith, 2 Bro. C. C. 579, 582, the Lord Chancellor says: "It is clear and never has been disputed that a surety, generally speaking, may come into this court, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money, and deliver him from the obligation."

A recent instance of that was the case of Wooldridge v. Norris, L. R. 6 Eq. 410, 413. In that case Veal the younger borrowed £50. from the trustees of a charity, the plaintiff and Hopkins entering into bond A as sureties for its repayment. Veal the elder was counter-surety under bond B providing for payment to the plaintiff and Hopkins of "all such sum and sums of money, costs, damages, and expenses which they respectively may be called upon, and be liable and compelled to pay" under bond A, and saving them harmless and keeping them indemnified from all actions, suits, or other proceedings under bond A. The principal debtor Veal the younger not having paid the £50., the trustees of the charity applied to the plaintiff, one of the sureties under bond A, for payment. The counter-surety under bond B being dead, the plaintiff filed a bill against his executors, charging that the trustees of the charity had recently applied to the plaintiff for payment of the £50. secured by bond A, and the plaintiff thereupon applied to the defendants to pay the same, but they alleged they had no funds, and praying for administration, and for an order that the defendants might be directed to pay the £50. out of the counter-surety's estate and to indemnify the plaintiff against all claims under bond A. To this bill the defendants demurred for want of equity. They contended that the plaintiff, though called upon to pay the £50. as surety under bond A, had not in fact paid anything to the trustees of the charity, and that until he had done so he had no right of action or suit against the counter-surety or his executors under bond B. Giffard, V. C., said: "In this case the bill, which is in the nature of a bill quia timet, is one of a kind which is rather unusual in modern times. The objections which were taken to it were, first, that a state of circumstances had not arisen to give the plaintiff the right which he claims, of filing the bill; and, secondly, that it was not a bill on behalf of the plaintiff and all other creditors. Now, as regards the right of a plaintiff to file a bill quia timet, the principle is clearly laid down by Lord Redesdale in these terms (Mitford on Pleading [5th Ed.] pp. 171, 172): 'A court of equity will also prevent injury in some cases by interposing before any actual injury has been suf-

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fered, by a bill which has been sometimes called a bill quia timet, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances.'"

Then it was argued, although, perhaps I may say, but faintly, that in Padwick v. Stanley, 9 Hare, 627, Turner, V. C., limited the cases in which the court of equity exercised that jurisdiction to "cases where the creditor has a right to sue the debtor and refuses to exercise that right."

In my opinion the cases in which equity has granted relief to sureties have not been limited to cases where the creditor has refused to sue. In Wooldridge v. Norris, L. R. 6 Eq. 410, that element did not exist.

In Mathews v. Saurin, 31 L. R. Ir. 181, it was determined that "when there is an actual accrued debt," as there is in the present case, "and the surety is liable and admits liability for the amount guaranteed," which, again, is the present case, "he has a right to compel the principal debtor to relieve him from his liability by paying off the debt. In order to support such an action it is not necessary to prove that the creditor has refused to exercise his right to sue the principal debtor."

The suggested limitation in Padwick v. Stanley, 9 Hare, 627, was disapproved. It is true that the disapproval was only obiter, because the creditor had, in fact, brought an action against the principal debtor.

The present action is not like Dale & Perry v. Lolley, 2 Bro. C. C. 582, note, where a surety brought an action to compel the debtor to pay a bill not due for twenty months, or Hughes-Hallett v. Indian Mammoth Gold Mines Co., 22 Ch. D. 561, where he asked for indemnity against a future contingent liability. The obligation of the executors is a present liability, and they are entitled to the relief they ask. There must be a declaration that the plaintiffs, as executors of the deceased, are entitled to be discharged and exonerated from all liability under the guarantee by payment by the defendant company to the bank of the £17,219. with interest from June 30, 1908, or so much thereof as is now owing by the defendant company to the bank.

There must be an order for the defendant company to pay the amount to the bank, so as to satisfy the plaintiffs' liability, with liberty to apply in event of non-payment. The costs will follow the event.[5]

[5] Accord: Wright v. Morley, 11 Ves. Jr. 11 (1805).

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TAYLOR v. HERIOT.

(Court of Chancery of South Carolina, 1812. 4 Desaus. Ch. 227.)

The bill was filed in this case by the complainant, who had become surety for the late Wm. Heriot, in a bond executed in April, 1803, and conditioned to pay a large sum of money to Mr. Withers, the guardian of Miss Butler, at a time when Wm. Heriot was in good credit, and apparently in affluent circumstances. Mr. Heriot on 24th June, 1807, executed a mortgage to the complainant of four lots of land and eight negroes, part of which however were comprised in the deeds hereinafter mentioned, or were subject to judgments. Since the death of Mr. Heriot, in November, 1807, it appeared that his affairs were embarrassed, and that if the marriage settlement executed by him previous to his marriage with Miss Thomas, on the 10th May, 1792, and certain other subsequent deeds, were supported, his estate would not be adequate to the payment of his debts; and in that case the complainant would be obliged to pay the debt of Mr. Heriot to Mr. Withers, for which he was surety.

The bill sought relief, by setting aside those deeds, and subjecting the property to the debts of Mr. Heriot.

An objection was made at the hearing that the complainant came too soon for relief, as he had not yet been damaged, not having been obliged to pay the security debt. But the judge was of opinion that a surety need not wait until he had paid the debt, but might come for relief as soon as he was endangered, and that it was manifest in this case that he was endangered. From this part of the decree there was no appeal. * * *[a]

SCANLAND v. SETTLE.

(Supreme Court of Tennessee, 1838. Meigs, 169.)

John Burris, Jr., being indebted on account to Settle, Whitley & Smith, merchants and partners in trade, in the sum of $205.37½, to secure the payment thereof executed three several promissory notes with the complainant's intestate, William Locke, as surety, dated December 21, 1822, payable one day after date. Besides those notes he owed the defendants several other sums of money. To secure the whole, on the 7th of April, 1827, he executed a deed, conveying certain real and personal property to a trustee, not stipulating for any delay.

[a] The remainder of the case has been omitted.

Accord: Obiter, King v. Baldwin, 2 Johns. Ch. (N. Y.) 554 (1817). Subsequently this decision of Chancellor Kent's was reversed on other grounds. See 17 Johns. (N. Y.) 384, 8 Am. Dec. 415 (1819). Obiter, Gibbs v. Mennard, 6 Paige (N. Y.) 258 (1837).

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But the trustee never acted. The property remained in the hands of Burris, and he disposed of some portions of it. Locke died in 1833, and early in 1834, the defendants sued the complainant, his administrator, in Jackson county court, and at August session, 1834, recovered judgment for $344.06 debt and damages, besides costs. To enjoin this judgment, the complainant, on the 3d of November, 1834, filed his bill in Jackson circuit court, afterwards transferred to the chancery court at Livingston, charging that the property mentioned in the deed was an ample indemnity and security for the demand of the defendants against Burris; that the deed had been taken to indemnify Locke, and discharge him from liability, and that such was its legal effect; that the defendants had collusively permitted Burris to dispose of and enjoy the property mentioned in the deed, but that there yet remained a sufficient amount of it subject to the control of the trustee and the defendants to pay and discharge the judgment and costs; praying for a perpetual injunction against the judgment, and, in case that should be refused, that the court would cause the trust to be executed, and the property mentioned in the deed, or such part of it as remained undisposed of, and subject to the control of the defendants, to be sold, and the proceeds applied to the discharge of the judgment, and for general relief.

The answer of Settle, the acting partner of the defendant's firm, admitted that the trustee had not acted; that Burris had retained the property, and had disposed of some part of it, without any collusion on the part of defendants, who had been merely passive. The other answers were to the same purpose. The injunction was dissolved, and the money collected from the complainant.

On the hearing, on the 5th of January, 1837, before Chancellor Williams, he ordered the injunction to be made perpetual; that the defendants should repay complainant the amount collected of him, and also the costs. The defendants appealed in error. The cause was heard in the Supreme Court at December term, 1837, when the court reversed his honor's decree so far as it released Locke's estate, and pronounced a decree that complainant should be substituted, in consideration of the money paid by him as Locke's representative, to the rights of Settle, Whitley & Smith, and that the land in the deed of trust mentioned should be sold to satisfy the same. The land was accordingly sold, and the commissioner's report was read and confirmed at December term, 1838.

GREEN, J., delivered the opinion of the court.

The bill in this case alleges that, one Burris being indebted to the defendants in the sum of about $208, he executed to them his bonds, with Locke, the complainant's intestate, as his surety. In 1827, the defendants took a deed of trust from Burris, for a tract of land, a negro, and all his personal property, to secure the payment of certain debts therein specified as due them, including the debts for which Locke was surety. Defendants permitted Burris to retain possession

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of, use, and waste the personal property mentioned in the deed of trust; and in 1833 having died intestate, suits were brought against the complainant, his administrator, and judgments obtained. The bill charges that "there is sufficient portion of the property named in said deed of trust, now in the county, subject to the control of, and sale by, the said Settle, Whitley & Smith, and the said Thomas Smith, trustee, to pay and satisfy said judgment and costs."

The complainant prays that the estate of Locke be released from liability, and the defendants be compelled to resort to their deed of trust to make their debt.

The Chancellor decreed in favor of the complainant, and enjoined the judgment against him, from which the defendants prosecute this appeal.

We are unable to find any authority upon which this decree can be supported. The Chancellor seems to have placed his decree upon the ground that the defendants, by taking the deed of trust, including all the property of Burris, placed Locke, the surety, in a worse situation, than he would have been in, had the deed not been made. But this, we think, is a mistaken view of the subject.

The deed does not stipulate for any delay to sue on the notes, nor is it a legal consequence that there should be any delay. So that the facts do not justify us to put the case upon the ground of a stipulation for delay, upon a good consideration, without the knowledge, or assent of the surety, whereby he would be discharged. Nor can the mere fact that the deed was taken as an additional security for the debt discharge the surety. It is true that the surety, on paying the money, would be entitled to be substituted to the rights of the creditor, and to have the benefit of the deed of trust. 1 Story's Eq. § 502. But this very right of substitution shows that the surety is not discharged; for, if discharged, there would be no need of the substitution. So far from the fact of a creditor taking a deed of trust, or mortgage, from the principal debtor as an additional security, being prejudicial to the surety, it is for his benefit—it is for his indemnity, as though he had taken it himself. Having paid the money, he can avail himself of it, as though it had been executed to him, as an indemnity for his suretyship. It is unreasonable, therefore, that an act, no way injurious, but highly beneficial to the surety, should operate to release him from his liability to the creditor.

But it is said, that where a creditor takes collateral security, and by any act of his own puts it out of his power to make an assignment of such security to the surety, who may have paid the debt, such surety would be discharged. 1 Story's Eq. § 502. This is certainly true, but the principle does not apply to this case. It is true that part of the property conveyed in the deed was used and disposed of by Burris, and if the whole security had been lost, through the negligence and misconduct of the defendant, it would have formed a ground of relief under this head. But the bill, answers, and proof all concur in

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showing that the land, which is still liable to this debt, is sufficient to satisfy it. Surely, then, if there remain of the security a sufficiency ample to indemnify the surety, he has no right to complain that part of it has been wasted. Indemnity is all he would have been entitled to, at any rate, and if he obtains that, as he alleges in his bill may be done, his situation is as good as though none of it had been wasted. There is, therefore, no equity against the judgments at law in favor of the defendants, and the decree must be reversed.

But as all the parties are before the court, and it appearing that the amount of the judgments at law, against the complainant, was discharged, on the dissolution of the injunction in this cause, we are of opinion that complainant may be substituted to the rights of the defendants, Settle, Whitley & Smith, and that the land in the deed of trust mentioned be sold to satisfy the amount paid by complainant on account of Locke's suretyship and the costs of this suit.

Judgment reversed.[7]

HOLCOMBE v. FETTER et al.

(Court of Chancery of New Jersey, 1905. 70 N. J. Eq. 300, 67 Atl. 1078.)

On demurrer to bill.

STEVENS, V. C. This is a suit by one of several sureties to compel a principal debtor to pay his debt to his creditor. It is said by Chancellor Green, in Irick v. Black, that, as soon as the debt has become payable, a surety may file a bill to compel payment by the principal, in order that the surety may be relieved from responsibility. That this rule is well settled appears from the following citations: Pom. Eq. Jur. § 1417; Dering v. Winchelsea, 1 Lead. Cas. Eq. (Am. Note) *100; Irick v. Black, 17 N. J. Eq. 189; Delaware, Lackawanna & Western Railroad Co. v. Oxford Iron Co., 38 N. J. Eq. 153; Philadelphia & Reading Railroad Co. v. Little, 41 N. J. Eq. 519, 529, 7 Atl. 356; Herron v. Mullen, 56 N. J. Eq. 839, 42 Atl. 1016. It is argued that the rule is not applicable to the case at bar because it does not appear that the principal debtor is insolvent or in danger of becoming so; but the jurisdiction does not rest upon this distinction.

It is further argued that if the defendant Labaw sleep upon his rights as creditor, and by reason of his laches fail to recover from the principal debtor, such laches will be a defense to an action for contribution. But what delay amounts to laches is often a matter of doubt. The original creditor is not barred by laches alone. Pintard v. Davis, 21 N. J. Law, 632, 47 Am. Dec. 172; Newark v. Stout, 52 N. J. Law, 47, 18 Atl. 943. Whether a co-surety who has paid the entire debt, and thus, at least to some extent, succeeded to the creditor's rights, stands as to laches in a less favorable position than the original creditor, need not be considered, for the jurisdiction in this

[7] **Accord: Gilliam v. Esselman, 5 Sneed (Tenn.) 86 (1857).**

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class of cases rests upon the fact that there is a debt due which it is the duty of the principal debtor, in exoneration of his sureties, to pay forthwith. The bill is one quia timet. So far as the complainant is concerned, his liability, and therefore his right to exoneration, is the same as it ever was.[8]

STEPHENSON v. TAVERNERS.

(Court of Appeals of Virginia, 1852. 9 Grat. 398.)

MONCURE, J., delivered the opinion of the court.[9] * * *

In regard to the remaining claim, to wit, the claim of the appellant to have the debt to Holliday, for which he is bound as surety, paid out of the estate of Baldwin, the principal debtor: when the suit was brought, the appellant had not paid the debt, and probably has not yet paid it. But he is entitled nevertheless, the debt being due, to come into equity by a bill quia timet, against the creditor and the debtor, and compel the latter to make payment of the debt so as to exonerate himself for his responsibility. Story's Eq. Jur. §§ 327; 639, 849. He may enforce, for his exoneration, any liens of the creditor on the estate of the principal, and, if the latter be dead, may bring any suit in equity which the creditor could bring for a settlement of the administration account of the estate of the decedent, and for the administration of the assets, whether legal or equitable. The only difference is that he must bring the creditor into court along with him, in order that he may receive the money when it is recovered.

The appellee, therefore, had a right to bring this suit for the recovery of this claim. He ought to have brought it, not only for himself, but for all other creditors of Baldwin, who might elect to become parties, and contribute to the costs of the suit. His object was not only to have an account and payment in a course of administration, but to have the assets marshaled if necessary, and the equitable assets, if any, apportioned pari passu among all the creditors; and all the

[8] Accord: Graham v. Thornton (Miss.) 9 South. 292 (1891).

Numerous English and American cases are in accord with the principal case, among others the following: Stump v. Rogers et al., 1 Ohio, 533 (1824); Washington v. Tait, 3 Humph. (Tenn.) 543 (1842); Howell v. Cobb, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591 (1865); Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582 (1841); Irick v. Black et al., 17 N. J. Eq. 189 (1864); McConnell v. Scott, 15 Ohio, 401, 45 Am. Dec. 583 (1846), where the principal was insolvent, and the debts due from certain defendants were decreed to be paid in exoneration of complainant; Barbour v. Nat. Ex. Bank, 45 Ohio St. 133 (1887) holding section 5845 Rev. St. Ohio 1880, to be merely declaratory of the equitable right; Doble v. Fidelity & Casualty Co., 95 Wis. 540, 70 N. W. 482, 60 Am. St. Rep. 135 (1897); West v. Chasten, 12 Fla. 315 (1868); Norton v. Reid et al., 11 S. C. 593 (1867); obiter, Croone v. Bivens et al., 2 Head (Tenn.) 339 (1859); obiter, Antrobus v. Davidson, 3 Mer. 579 (1817); obiter, Whitridge v. Durkee, 2 Md. Ch. 442 (1850); obiter, Gilliam v. Esselman, 5 Sneed (Tenn.) 86 (1857).

[9] The statement of facts and a portion of the opinion are omitted.

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creditors were necessary parties, at least in that general way. 1 Story's Eq. Pl. § 99. The creditor who was entitled to receive the debt, for which the appellant was bound as surety, should also have been a party; and so should the heirs or devisees of Baldwin, who were interested in the real estate sought to be marshaled and applied as equitable assets. The suit was therefore defective for want of parties; but it ought not on that ground to have been dismissed.

The appellant should have been permitted to amend his bill and make the necessary parties, unless a decree for an account had been made in some other creditor's suit, having in view the same objects; in which case it would have been proper to have stayed or dismissed the appellant's suit, and required him to become a party to the other suit by petition or motion, or proving his claim before a commissioner. "If several suits are depending in favor of different creditors, the court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in such suit, so that only one account of the estate may be necessary." Story's Eq. Pl. 100, note 2; Hallett v. Hallett, 2 Paige (N. Y.) 15; Ross v. Crary, 1 Paige (N. Y.) 416, note a. * * *

The decree was [in part] as follows:

"The court is of opinion * * * that instead of dismissing the bill in other respects, the circuit court should have permitted the appellant to amend it, and make all other creditors of Charles R. Baldwin, who might elect to become parties and contribute to the costs of the suit, plaintiffs with himself, and make the creditor entitled to receive the debt to Holliday in the bill mentioned, for which the appellant is bound as surety, and the heirs or devisees of said Baldwin, defendants. * * *"

HUGHES-HALLETT v. INDIAN MAMMOTH GOLD MINES CO.

(Supreme Court of Judicature, Chancery Division. 1882. L. R. 22 Ch. Div. 561.)

This action was brought to rescind a contract by the plaintiff to take shares in the Indian Mammoth Gold Mines Company, and to obtain from the other defendants an indemnity against liability on the shares.

The company was formed by registration under the Companies Acts, 1862 and 1867, on the 13th of August, 1880, for the purpose of working some gold mines in India. The liability of the shareholders was limited, the nominal amount of each share being £1. On the 14th of August, 1880, a prospectus of the company was issued by the directors. For the purposes of the present report it is unnecessary to refer to the statements contained in the prospectus. Shortly after it had been issued it was seen by the plaintiff. One E. M. Cookesley had an interest in the mine, which the company had agreed to purchase, and at

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his request the plaintiff applied for and obtained an allotment of 4,000 shares in the company, and paid 2s. 6d. per share on application, and a further sum of 2s. 6d. per share on allotment, making £1,000. altogether. The plaintiff was to hold the shares as a trustee for Cookesley, and Cookesley furnished him with the £1,000. which he paid for the shares.

The allotment to the plaintiff was made, so far as appeared, by the secretary of the company without any authority from the directors. When Cookesley asked the plaintiff to apply for the shares, he said that he would get the plaintiff to execute a transfer of the shares to him (Cookesley), and that he (Cookesley) would send it in to the company for registration within a fortnight or three weeks. The plaintiff executed a transfer accordingly, and Cookesley afterwards sent it to the company for registration; but the directors, under a power contained in the articles of association, refused to register it, and consequently the plaintiff's name remained on the company's register as the holder of the shares.

The plaintiff, on the 13th of April, 1881, issued the writ in this action against the company, the directors, and Cookesley. He alleged by his statement of claim that he applied for the shares on the faith of the prospectus, from which he believed that the property of the company was valuable, and that he was incurring no risk in making the application; and he alleged that the prospectus contained material misrepresentations and omitted to disclose material facts. The plaintiff claimed to have the allotment of shares to him canceled, the contract to take the shares rescinded, and the register of the company rectified accordingly. He also claimed an indemnity by the directors and by Cookesley from any liability in respect of the shares.

By their statements of defense the directors denied that the plaintiff applied for shares on the faith of the prospectus, and alleged that he did so in pursuance of an agreement between himself and Cookesley. They also denied that the prospectus contained any misrepresentations or omitted to disclose any material facts.

Cookesley, by his statement of defense, did not deny that the plaintiff applied for the shares at his request.

On the 29th of June, 1881, an order was made to wind up the company. The plaintiff afterwards applied to Mr. Justice Chitty, to whose court the winding-up was attached, for leave to continue the proceedings in the action against the company, but this application was refused. Consequently the action proceeded only against the directors and Cookesley.

Cookesley did not appear at the trial.

For the purposes of this report it is unnecessary to refer to the evidence as to the alleged misrepresentations in the prospectus.

When the action came on for trial, 15s. per share remained uncalled, and there was no evidence to show whether any further call was likely to be made in the winding-up.

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[FRY, J. As against Cookesley it is a mere quia timet action. Can you maintain an action to enforce an indemnity against a liability, which may never exist? Lord Ranelaugh v. Hayes, 1 Vern. 189, is, so far as I know, the only case in your favor, but it has been disapproved. (Vide Lloyd v. Dimmack, 7 Ch. D. 398.)] * * *[10]

FRY, J., after stating the facts, continued:

The plaintiff's case against Cookesley is this: That he is liable to indemnify him in respect of the 15s. still payable on the shares, and upon the evidence before me I am certainly of opinion that the plaintiff is entitled to an indemnity from Cookesley in respect of that 15s. But then arises this fact for consideration, namely, that no part of the 15s. has been called for, and, for anything that appears in evidence before me, no part ever will be called for. Whether it will in fact, of course, I cannot tell. It appears to me, therefore, that this is the simple case of a person who has taken property in his own name on behalf of another, and who is entitled to an indemnity from that other person against liability in respect of that property, suing for an indemnity before the contingency which creates the damage has arisen. It is, in my judgment, a mere action quia timet, and it is a very important inquiry whether such an action can be maintained. If it can, it is obvious that every person who has undertaken a position of responsibility for another which entitles him to an indemnity may sue before the right to indemnity accrues—before the damage has accrued which gives rise to the right to indemnity. It appears to me that there is no authority for such an action. The case of Lord Ranelaugh v. Hayes, 1 Vern. 189, is, so far as I am aware, the only authority which countenances such a view, and, as I observed on a previous occasion, that case has never, so far as I am aware, been followed. I can see, therefore, no authority binding me to pronounce such a judgment, and I must decline so to enlarge the jurisdiction of the court. It appears to me that it would lead to most injurious consequences if I were to allow a person in the position of the plaintiff to seek for an indemnity before he is injured. There have been, undoubtedly, cases in which, where a contract for indemnity existed, and a right to sue upon that contract had arisen, the court has declared the right to indemnity generally, and has put matters in such a train that, when the subsequent right to indemnity should arise, the indemnity might be worked out. Some forms of judgments in that class of cases are to be found in the last edition of Seton on Decrees, and they show that where a person has taken shares for another, and a call has been made which has not been met by the person liable to pay it, the trustee who is entitled to an indemnity may obtain a declaration of his title generally, and may possibly obtain liberty to apply from time to time to work it out.

[10] The arguments of counsel are omitted.

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It has been contended that the plaintiff is entitled to some better contract of indemnity than that which has been entered into by Cookesley, but, in my judgment, that is not the law of the court. If the plaintiff was minded to accept the personal contract of Cookesley for indemnity, he must be content with that, and I cannot possibly give him any better indemnity. If authority were necessary for that proposition, it appears to me that it is supplied by the case of Brough v. Oddy, 1 Russ. & My. 55.

Then it is said that this is not a mere action quia timet, because there has been a breach of Cookesley's contract to obtain a transfer of the shares. It appears to me that the real contract between the plaintiff and Cookesley was only that Cookesley should send in the transfer for registration, and that contract he has performed. But, even if the contract were to obtain the registration of the transfer, that is not a contract which this court would specifically perform, because it is admitted that the reason why the transfer has not been registered is the refusal of the directors to register it, a refusal with which I have no power of dealing in an action between the plaintiff and Cookesley. It appears to me, therefore, that, so far as this is an action against Cookesley for specific performance, it is misconceived, because there is the right in a third person to prevent the specific performance. So far as it is an action for indemnity, it is also misconceived, because no liability has yet arisen which can give rise to an action. I am therefore, though somewhat unwillingly, compelled to refuse the plaintiff any relief as against Cookesley.

His Lordship then considered the case made by the plaintiff against the defendant directors, and held that that case also failed. And his Lordship dismissed the action with costs, except as against the company.[11]

[11] The surety himself is not liable until the default of the principal, and the creditor cannot anticipate such default, and have money set aside in the surety's estate to be due on the happening of such contingency. Antrobus v. Davidson, 3 Mer. 569 (1817).
Unless by special statutory provision.

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CHAPTER II

THE SURETY'S EQUITY OF REIMBURSEMENT

DE LECTON v. DE SUTTONA.

(Michaelmas Term, 1223, 7 & 8 Hen. III. Bracton's Note Book, Case No. 1,641.)

Hugo De Lecton sues against Robert de Suttona that he return to him seven pounds, fourteen shillings, eight pence, which he owes to him and unjustly detains from him, for that Randolph Bacon loaned that money to the said Robert upon the security of him, the said Hugo. So that the said Hugo at his distress paid it to the same Randolph for the same Robert, and this he offers to prove, etc., wherefore he has been damaged, etc. And Robert comes and defends against him, etc., that he never became security for him nor does he owe him anything nor has this same Hugo paid money for him, and he offers to defend this, etc. And therefore it is adjudged that he defend himself before 12 hands (men)—i. e., a jury—and that he come such a day with his law.

SIR DANIEL O'CARROLL'S CASE.

(High Court of Chancery, 1745. 1 Amb. 61.)

On appeal from decree made by the Master of the Rolls, the case was:

Bill was brought by plaintiff as creditor of Sir Daniel O'Carroll against Sir Daniel and ———, administratrix of her husband, who was surety for Sir Daniel, for payment of a sum of money upon a note of hand, payable by installments. It appeared that Sir Daniel had been discharged by the insolvent debtors act, and that, previous to the time of his discharge, one of the times of payment became due, and the rest have since. His honor made the common decree for payment by the surety, and she to have remedy over against Sir Daniel, the principal. From this decree there was an appeal; and it was said the surety cannot have a decree against the principal, because this court has only jurisdiction in personam, and not in rem, except in case of specific performance of articles, etc., and the person of Sir Daniel is discharged by the statute; but Lord HARDWICKE, C., cleared himself of that difficulty, and said he could make a decree, the same as a judgment would be at law, and likened the case to that of a privileged person, who is decreed to satisfy, etc., and on refusal, instead

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of an attachment, a sequestration issues immediately after the writ of execution, and the estate and effects are detained in the hands of the officer, till the party has complied with the decree.

Decree: Defendant the administratrix shall have remedy against Sir Daniel's estate and effects, except his wearing apparel, for the money due on the first installment, and the common decree for the rest.

GLOSSUP v. HARRISON.

(In Chancery, 1814. 3 V. & B. 134, Coop. t. Eld. 61.)

A motion was made by the surety of a receiver, who had been discharged by order, to restrain him from taking out of court the balance due to him without discharging what the surety had paid on his account.

THE LORD CHANCELLOR. Where the surety for a receiver in this court is called upon to pay, as the receiver is an officer of the court, and the surety is so in a sense, if there is anything due in account between them, justice requires that upon the application of the surety he shall be indemnified for what he has paid for the receiver out of the balance due to him. If that has not been decided, as I think it has, it must be decided upon principle, as it is clearly capable of being maintained upon equitable grounds. The court therefore cannot part with the fund until an opportunity is given of determining the claim of the surety, the amount of which, when ascertained, must be paid to him, and the residue only must be paid to the receiver.

TINSLEY v. OLIVER'S ADM'R et al.

(Supreme Court of Appeals of Virginia, 1817. 5 Munf. 419.)

Upon appeals from decrees of the Superior Court of Chancery for the Richmond District, dismissing, with costs, two bills exhibited by the appellant, the object of which was to obtain retribution for the amount of several judgments, on bonds, obtained against him, and paid by him, as security for the intestate, John Oliver; the prayer of the bills being that the administrator should render an account of the personal assets, and satisfy the claims of the plaintiff, as standing, in equity, in the shoes of the judgment creditors; that the other defendants should render an account of the real estate, and in case of a deficiency of the personal estate, which was suggested as probable, that his said claims might be charged upon the real estate, either by marshaling assets, or putting him upon the footing of a bond creditor. In one of the cases, the plaintiff appeared to have obtained a judgment at law against the administrator, but without receiving sat-

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isfaction; in the other, no motion had been made, or suit at law instituted, to recover the money paid. No objection to the jurisdiction of the court of equity was taken by the defendants. Chancellor Taylor dismissed the bills, on the ground that, in his opinion, the plaintiff had complete remedy at law, but without prejudice to any suit he might be advised to bring at law.

Judge ROANE pronounced the court's opinion as follows:

The court is of opinion that the decrees in these cases, dismissing the bills of the appellant, are erroneous, the appellant being properly in a court of equity, as well for the purpose of establishing his demand against the estate of the appellee's intestate, in the second suit, as of having an account of his personal estate, and being permitted to stand in the place of the obligees in the bonds, in the bills mentioned, so as to be paid out of the real assets in default of the personal.

The decrees are therefore reversed, with costs, and the causes are remanded, to be proceeded in, pursuant to the principles of this decree.

DECKER v. POPE.

(London Sittings, 1757. 1 Selw. N. P. [13th Ed.] 91.)

This was an action brought by an administrator de bonis non of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant; and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use.

Lord MANSFIELD directed the jury to find for the plaintiff; observing that, where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added that he had conferred with most of the judges upon it, and they agreed in that opinion.[1]

[1] "'The absence of any remedy at law was conceded in 1662. It was said by Buller, J., in Toussaint v. Martinnant [2 Term R. 100, 105], that the first case in which a surety who had paid the creditor succeeded in an action at law against the principal for indemnity was before Gould, J., at Dorchester, which was decided on equitable grounds.' The innovation seems to be due, however, to Lord Mansfield, who ruled in favor of a surety in Decker v. Pope [1 Selw. N. P. (13th Ed.) 91] in 1757, 'observing that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law.'" Ames' Essay on Assumpsit, 2 Harvard Law Review, p. 59.

The practice existed of protecting the surety by making him the obligee in a counter-bond for his indemnity. 3 Reeves' History of the Common Law, p. 384, citing Y. B. 16 Edw. IV, 9.

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INGALLS v. DENNETT.

(Supreme Judicial Court of Maine, 1829. 6 Me. 79.)

This was a scire facias against the defendant, as trustee of the goods of one Richardson. It appeared from his examination that he had property of Richardson's in his hands, to the value of about $28, but that he was surety for Richardson in a note overdue to a third person for more than $100, for which he was sued, after the service of the trustee process in this case, and which, to relieve his property, from attachment, he had since paid, without indemnity from the debtor, except the above balance of $28, which, by agreement with Richardson, he had indorsed on the note he had taken up.[2]

MELLEN, C. J., delivered the opinion of the court in the ensuing June term in Lincoln, observing that the question must be decided on the facts as they existed at the time the process was served, and at that time Dennett had no right of action against Richardson; for he had not then either paid the note for which he was surety, nor absolutely assumed the debt himself, by giving a new security, and discharging Richardson from his liability. Neither of these things having been done, the court must, according to settled principles, consider him as trustee, though the case seems to be a hard one for the defendant.

Trustee charged.[3]

CORNWALL v. GOULD.

(Supreme Judicial Court of Massachusetts, 1827. 4 Pick. 444.)

Assumpsit for money had and received; lent and accommodated; and paid, laid out and expended. Two special counts were filed at the term of the trial.

The ground of the action was that in April, 1822, in Georgia, a promissory note was made at the request of the defendant, for the sum of $1,700, by J. Denniston, payable to the plaintiff, and by him

[2] The argument of counsel is omitted.

[3] Powell v. Smith, 8 Johns. (N. Y.) 249 (1811), accord, unless varied by code provisions, as in Hannay v. Pell, 3 E. D. Smith (N. Y.) 432 (1854).

Payment made by the surety before maturity entitles him to reimbursement as of maturity. Armstrong v. Gilchrist, 2 Johns. Cas. 424 (1800); Craig v. Craig, 5 Rawle (Pa.) 91 (1835).

Though no action lies until payment by the surety, there are some cases which permit collateral (notes, etc.) to be realized upon, though notes are made by principal to the surety directly.

See Merchants', etc., Bank v. Cumings, 149 N. Y. 360, 44 N. E. 173 (1896), and cases therein cited.

Where, in addition to the legal duty of reimbursement, an express agreement is made between principal and surety that the former will pay the debt when due, the surety's right of action arising out of the agreement exists before his payment. Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199 (1881).

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indorsed for the purpose of being discounted for the use and benefit of the defendant at a bank in Georgia; that the note was discounted at the bank and the money received by the defendant, who had undertaken to indemnify the plaintiff, and for that purpose had assigned to him conditionally a patent right; that, after one or two renewals of the note at the bank, it was paid by the plaintiff out of his own funds, by giving a new note, signed by himself and indorsed by one Clafflin; and that he had received nothing therefor from the defendant.

The jury were instructed by the Chief Justice, that if they were satisfied that the note was made at the request of the defendant and for his use and benefit, and that the plaintiff was the party to the note on whom the bank relied, and that the debt was paid to the bank by the plaintiff, this would constitute a good ground of action for money lent and accommodated. Also, that the giving a new note to the bank by the plaintiff, with another indorser, in lieu of this note, after it had been several times renewed, the first being given up as paid, was, without evidence of payment of the new note, a payment in law of the first note, so as to entitle the plaintiff to recover upon the money counts.

The defendant objected to the filing of the two special counts, as being for a different cause of action, which objection was overruled.

A general verdict was found for the plaintiff, and the defendant moved for a new trial.[4]

WILDE, J., delivered the opinion of the court. This is an action of assumpsit. The declaration contains the usual money counts, and two special counts, all, however, founded on the same cause of action. At the trial a general verdict was returned for the plaintiff, and the defendant now objects to one of the special counts as insufficient to warrant a judgment on the verdict. But this objection cannot prevail. The rule is that when there are several counts for the same cause of action, and a general verdict is returned, it may be altered so as to apply to any one count, because such alteration cannot prejudice the defendant on the question of damages. The general question therefore is whether there is any one count supported by the evidence.

First, it is objected to the count for money paid that no money has in fact been paid, and that the giving a negotiable note of hand for a prior debt is not equivalent to payment, so as to warrant a recovery in this form of action. This objection is applicable also to the other counts. But if the law was correctly laid down in the case of Barclay et al. v. Gooch, 2 Esp. 571, this objection cannot prevail. It is said that this case has been overruled; and it certainly has been doubted. It was also a case at nisi prius; but it was afterwards sanctioned by the opinion of the other judges. It is also confirmed by a similar decision in New York in the case of Witherby v. Mann, 11

[4] The arguments of counsel have been omitted.

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Johns. 518, and has been mentioned with approbation by this court. Douglas v. Moody et al., 9 Mass. 553. The cases, in which a different doctrine seems to be maintained, are all distinguished from the case of Barclay et al. v. Gooch, and cannot therefore be considered as overruling it.

In these later cases it has been held that a bond given for a prior debt, due on simple contract not under seal, was not such a payment as would support an action for money paid; yet the prior debt was certainly extinguished by the bond. The distinction, however, is that bonds can in no sense be considered as money; whereas negotiable bills and notes are frequently so considered, and are so treated in the ordinary transactions of business. It may be said that this is a technical distinction, and it is so; but to a technical objection a technical answer is sufficient.

Another objection to the plaintiff's recovery is that the debt paid was not the debt of the defendant, but of one Denniston. It appears by the report of the case that Denniston gave his note at the request of the defendant, who received the money after the note had been discounted at the bank. It was indorsed by the plaintiff for the use of the defendant, who promised to indemnify him; so that it is clear that the plaintiff had no claim on Denniston. If he had paid the note, the defendant would have been liable to him; and from this liability the defendant has been discharged by the plaintiff. So far as the plaintiff's rights are concerned, the debt was the defendant's, and not Denniston's.

It is also objected that the payment by the plaintiff was voluntary and not in consequence of any legal liability, there being no proof that he had been duly notified by the bank so as to charge him as indorser. It is a sufficient answer to this objection that notice may be presumed, and that it is now too late to make the objection, as it was not made at the trial. If the cashier of the bank, whose deposition was taken and used at the trial, had been interrogated, the fact might have been ascertained.

Another objection is that the plaintiff took security from the defendant for his indemnity, and cannot, therefore, resort to an implied promise. This would be true, if it had been agreed, or understood, that the plaintiff should look only to his security for his indemnity; but this does not appear, and the taking collateral security for the fulfilment of a promise to indemnify, whether express or implied, does not discharge the promisor from his obligation.

The last objection is that the defendant would be liable to Clafflin, should he be compelled to pay the outstanding note. But this objection also fails, for on the facts proved the plaintiff alone is liable to Clafflin. To make the defendant liable it must appear, either that Clafflin signed the note at his request, or that he agreed to indemnify him. There is no evidence of either fact, nor any circumstance proved from which the defendant's liability to Clafflin can be presumed.

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Upon the whole, we think the plaintiff is entitled to recover on the count for money paid, and that the verdict may be altered, and judgment rendered on that count.[5]

POWNAL v. FERRAND.

(Court of Common Pleas, Easter Term, 1827. 6 Barn. & C. 439, 13 E. C. L. 203.)

Assumpsit for money paid, laid out, and expended to the use of the defendant. Plea, general issue. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after the last term, the following appeared to be the facts of the case:

The plaintiff was the indorser of a bill of exchange for £350., payable three months after date, drawn on the 11th March, 1825, by one Ford, upon and accepted by Ferrand, the defendant. The bill was indorsed by Ford to the plaintiff, and by him to one Hayes, and again by him to one Field. The bill not having been paid when due, Field, the holder, brought actions against the several parties to the bill, and recovered judgment, and Pownal, the present plaintiff, on the 24th December, 1825, in consequence of such recovery against him, paid Field £40. on account of the bill. The defendant, Ferrand, having refused to pay the costs of the action against the other parties, Field recovered against him as acceptor £350. and £30. costs, and levied upon his goods £340., giving credit for the £40. paid him by Pownal. This action was brought to recover the £40. which Pownal, the plaintiff, had been compelled to pay to Field on account of the bill. It was objected that this money could not be recovered in this form of action, because there was no privity between the plaintiff and defendant; that the £40. was not paid in exoneration of the defendant, but of the plaintiff, who was a party to and liable on the bill; and it was said that it would be a great hardship on the acceptor of a bill if several indorsers could, by partial payments, acquire a right of action. The Lord Chief Justice was of opinion that as the defendant was liable by law to the amount of the bill, and as he had been exonerated from the payment of £40. by the plaintiff's payment of that sum, it must be considered as so much money paid to his use. A verdict having been found for the plaintiff, Starkie now moved for a new trial.[6]

Lord TENTERDEN, C. J. The facts of this case are so very peculiar that it appears to me that a decision in favor of the plaintiff will not tend to any mischievous consequences. The acceptor was primarily liable upon the bill to the plaintiff. Field sued the plaintiff on the bill, and obtained a verdict against him, and after that verdict the plaintiff paid Field £40. on account of the bill. Field also brought an ac-

[5] Accord on point that payment by note of surety is payment: Witherby v. Mann, 11 Johns. (N. Y.) 518 (1814).

[6] The argument of counsel is omitted.

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tion against the defendant as acceptor of the bill, and obtained a verdict against him for £350.; and judgment was signed for that sum and £30. costs, and an execution issued against the defendant, under which £340. was levied. This action is brought to recover from the defendant the sum of £40., which the plaintiff was compelled to pay as indorser of the bill. This case differs from Cowley v. Dunlop, 7 T. R. 565, and Houle v. Baxter, 3 East, 177; for in those cases the acceptors had become bankrupts, and obtained their certificates before the indorsers made any payment on account of the bills. At the time of making such payments, therefore, the acceptors had ceased to be liable on the bills. Here the money paid by Pownal is money which the defendant, Ferrand, was liable to pay, and justice requires that Pownal should be allowed to recover it back.

It is said that Pownal ought to have sued on the bill; but the bill was not in his possession, and, even if it was, there might be great difficulty in suing upon it, for the present defendant might have pleaded a former recovery of the whole amount of the bill. The plaintiff, by bringing this action for money paid to the use of the defendant, avoids this difficulty. I am of opinion that he is entitled to recover upon the general principle that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it.

BAYLEY, J. It is the duty of the acceptor of a bill to pay it when due. If any injury result to him by reason of his non-payment of the bill, he has no ground of complaint, for it arises from his own breach of duty. If he pays the bill when it becomes due, no party can call upon him. The holder of a bill, however, has a right to claim payment from all the parties to it; but the acceptor is the only person who ought to expect to be called upon to pay it. Each party may pay something, and in that case the acceptor will be responsible to the several parties to the extent of the sums which they have paid. Here the holder called upon the plaintiff, one of the indorsers, to pay the bill. If the defendant had done his duty as acceptor, the plaintiff would not have been so called upon. The plaintiff did pay £40. to the holder on account of the bill; and the question is whether he is to lose that sum, or has any remedy against the defendant, in consequence of whose default he was compelled to pay it. The law is that a party by voluntarily paying the debt of another, does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same, for the law raises a promise on the part of the person whose debt I pay to reimburse me. That principle was fully established in the case of Exall v. Partridge, 8 T. R. 308. There the goods of a stranger, which were on the premises of another, were distrained by the landlord for rent; and the

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stranger, in order to redeem them, was forced to pay the rent, and he brought an action to recover the same from the three joint lessees, from whom the rent was due to the landlord; and it was held that as the money was paid by compulsion, in satisfaction of a demand upon the three, the action was maintainable. So in this case the plaintiff paid, by compulsion, part of the debt due from the acceptor. It is said that the plaintiff has no remedy, because he has not paid the whole amount of the bill; but I think he is entitled to recover the part which he has paid, for to that extent the defendant has been benefited. The cases of Cowley v. Dunlop, 7 T. R. 565, and Houle v. Baxter, 3 East, 177, are distinguishable from the present, because in those cases the acceptors had become bankrupts and obtained their certificates, which operated as statutable releases of their debts before the money was paid.

HOLROYD, J. I am of opinion that this action for money paid to the defendant's use is maintainable. The defendant, as acceptor of the bill, was liable in the first instance to pay it. If he had performed his duty, the plaintiff would not have been called upon by the holder; but, as indorser, he was liable to be called upon either to pay the whole or part. He was called upon, and was actually compelled to pay part. There was no breach of duty on his part, and I think that, he having been compelled by law to pay money which the defendant was liable to pay, the law will imply a promise on the part of the latter to repay the money; for it is a general principle that a man who pays the debt of another by compulsion may recover from him the amount of the debt so paid. It is said that the plaintiff by making this payment was only remitted to his remedy upon the bill; but I am of opinion that the plaintiff is entitled to recover in this action upon the same principle upon which a surety is entitled to recover money from his principal. I think that a party is not bound to resort to the original engagement unless it be by deed, but that he may at his election found his action upon the original engagement, or bring indebitatus assumpsit for money paid.

LITTLEDALE, J. The authorities cited induced me for some time to entertain considerable doubt whether the plaintiff as indorser could recover in this form; but, upon further consideration, I am of opinion that although the plaintiff by making the payment may be remitted to his original right upon the bill, yet he may also maintain an action for money paid to his use. It is a general rule that a man who is compelled by process of law to pay money which another is liable to pay may in an action of indebitatus assumpsit for money paid to the use of that other, recover the same. This case in principle resembles Exall v. Partridge, 8 T. R. 308. There the lessees were liable by law to pay the rent. Here the acceptor was liable by law to pay the amount specified in the bill, and the indorser was liable only in default of payment by the acceptor. So, in Exall v. Partridge, the stranger, having his goods upon the premises in respect of which the rent was due, be-

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came, by reason of the default of the lessees, liable to satisfy the rent out of his goods. It was held in that case that the law would imply a promise on the part of the lessees to repay the stranger the rent which he had been compelled to pay. It is true that in this case the acceptor will become liable to several actions; but he has brought that upon himself by not paying the bill when it became due, as he ought to have done. The same inconvenience might happen in the case of a distress for rent; for if the goods of different persons were distrained upon, and they severally contributed sums towards payment of the rent, the lessees would be liable to several actions.

Rule refused.[7]

CRAIGHEAD v. SWARTZ et al.

(Supreme Court of Pennsylvania, 1907. 219 Pa. 149, 67 Atl. 1003.)

Appeal from Court of Common Pleas, Cumberland County.

Action by Charles C. Craighead, surviving partner of R. R. Craighead & Bro., for the use of John A. Craighead, by W. P. Stuart, committee, for the use of Margaret E. Craighead, executrix, against G. W. Swartz and another. From a judgment for defendants notwithstanding the verdict, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

BROWN, J. The facts in this case are not in dispute. They appear in the special verdict returned by agreement of the parties. John W. Craighead, appellees' decedent, made and delivered three promissory notes to R. R. Craighead & Bro. The first, dated April 18, 1892, was for $1,445.96, payable one year after date; the second, dated April 15, 1897, was for $1,217.07, payable one day after date; the third, dated July 1, 1902, was for $1,018.51 payable one day after date. Each of these notes was under seal. On February 5, 1904, R. R. Craighead & Bro. transferred these notes to John A. Craighead as collateral security for the payment of two judgment notes held by him against them amounting to $5,009.38. At the time R. R. Craighead & Bro. transferred the notes of J. W. Craighead to John A. Craighead they were insolvent, and were so at the time of the trial below. Before they transferred the notes, John W. Craighead had indorsed two of their notes in the Farmers' Trust Company of Carlisle; one for $5,000, dated February 2, 1903, payable 90 days after date, and the other, for $2,500, dated April 20, 1903, payable 90 days after date. These two notes were protested for non-payment; the first on May

[7] **Accord: Kimmel v. Lowe, 28 Minn. 264, 9 N. W. 764 (1881); Bullock v. Campbell, 9 Gill (Md.) 182 (1850); Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713 (1889). There being no written promise of the principal to the surety, the latter's action was barred by the statute relating to implied contracts.**

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4, 1903, and the second on July 20, 1903. On March 23, 1905, the Farmers' Trust Company brought suit against the estate of John W. Craighead on the notes indorsed by him, and judgment was recovered in September, 1906. In April, 1905, suit was brought by the committee of John A. Craighead against the estate of John W. Craighead on the three notes he had given to R. R. Craighead & Bro., and which they had transferred to John A. Craighead. The estate of John W. Craighead is not sufficient to pay in full all the claims against it.

The verdict of the jury, by consent of the defendants, was for $6,025.31, subject to reserved questions; the second being whether the liability incurred by John W. Craighead to the Farmers' Trust Company for the firm of R. R. Craighead & Bro. could be set off against the notes given by him to R. R. Craighead & Bro., and assigned by them to John A. Craighead. The agreement upon which the special verdict was rendered and the legal questions reserved was signed not only by the plaintiff and defendants, but by the Farmers' Trust Company. Whether that company is to be regarded as having been permitted by the agreement to intervene in the suit for the purpose of defending is immaterial. The one question, the right of the administrators of John W. Craighead, deceased, to make the defense that his liability as indorser for R. R. Craighead & Bro. must prevail against the claim of John A. Craighead's estate, is to be determined as if the Farmers' Trust Company was not a party to the stipulation for the special verdict and the reservation of the legal questions. Under a fair construction of this stipulation, the court below very properly considered the right of the defendants to a set-off as against the legal plaintiff through whom the use plaintiff claimed, without regard to any intervention by the Farmers' Trust Company. Judgment was entered for the defendants on the reserved question, and from it we have this appeal.

If R. R. Craighead & Bro. on February 5, 1905, being at that time insolvent, had brought suit against John W. Craighead on his three notes held by them, he could have interposed as a defense his liability as indorser on their protested paper held by the Farmers' Trust Company. When a principal has become insolvent, the surety may retain the moneys of the principal or the amount of his indebtedness to the principal as a fund for his indemnity. 27 Am. & Eng. Enc. of Law (2d Ed.) 478. "A principal who is insolvent cannot collect a debt which the surety owes him without his indemnifying the surety." 1 Brandt on Suretyship and Guaranty (2d Ed.) § 227. See, also, Abbey v. Van Campen, Freem. Ch. (Miss.) 273; Mattingly v. Sutton, 19 W. Va. 19; Walker v. Dicks, 80 N. C. 263; Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84. "The surety of an insolvent debtor cannot be compelled to pay a debt he owes his principal until he is released of his responsibility of suretyship, and may retain what he owes as a counter-claim against such surety." Scott v. Timberlake, 83 N. C. 382.

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In our own state, in Ross v. McKinny, 2 Rawle, 227, it was held that, in an action to recover a legacy, the executor might demand a conditional verdict that would permit him to retain the legacy until he had been indemnified against a demand for which the testator was surety for the legatee. In Beaver v. Beaver, 23 Pa. 167, in an action by an administrator of an insolvent estate, it was held that the defendant was entitled to set off the amount paid on a note by decedent on which he was surety, although the payment was not made until after suit brought, on the ground that the equity of set-off originated when the obligation to pay became absolute. It was there said: "As between principal and surety, courts of equity always lend their aid for the protection of the latter. As soon as the surety's obligation to pay becomes absolute, he is entitled in equity to require the principal debtor to exonerate him, and he may file a bill to compel an exoneration, although the creditor has not demanded payment from him. Theobald's Principal & Surety, 226; Nisbet v. Smith, 2 Bro. C. C. 579; Lee v. Rook, Mosely, 318; Story's Equity, § 327." This was followed by Thompson v. McClelland, 29 Pa. 475. The defendant there, as surety of the legal plaintiff, who was insolvent, was allowed to set off the amount paid on a judgment recovered against him as surety, although such payment was made after suit had been brought against him. In Miller & Reist v. Kreiter, to the use of Bomberger, 76 Pa. 78, Reist, the defendant below, indorsed a note made by Kreiter. Before his indorsement of this note he had given Kreiter a non-negotiable note. This note Kreiter assigned to Bomberger, who brought suit upon it on January 25, 1872. On April 6, 1872, judgment was recovered against Reist as indorser of Kreiter, and it was held that on August 30, 1873, on the trial of the suit brought by Bomberger, Reist could set off the amount of the judgment recovered against him as Kreiter's indorser. This court said: "As soon as the note was protested, June 10, 1871, and Reist's liability as indorser became fixed and absolute, he was entitled to call upon the maker to exonerate him from such liability, and that even before demand was made upon him for payment. Beaver v. Beaver, 23 Pa. 167. His right of set-off, as against any claim Kreiter had against him, may be said to have originated from this period."

The set-off allowed by the court in this case was an equitable one, and even if it may not have been technically within our defalcation act, it was a good defense in our courts, administering equity under common-law proceedings. As to this it is said in Hibert v. Lang, 165 Pa. 439, 30 Atl. 1004: "In general, in order to support a set-off there must be cross-demands between the same parties and in the same rights such as would sustain mutual actions against each other; yet wherever there is the practicability of avoiding circuity of action and needless costs, with safety and convenience to all parties (Gibson, C. J., in Tustin v. Cameron, 5 Whart. [Pa.] 379), or where there is a special equity to be subserved, and no equity of third parties to be injured, a

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set-off will be allowed upon equitable principles, though the case does not come within the language of the statute."

What John W. Craighead or his personal representatives could have set up as a defense if the suit on the notes had been brought by R. R. Craighead & Bro. clearly could be set up in a suit by the assignee of these notes, for they were taken by John A. Craighead subject to any defense the maker might have had against the original holders at the time they were assigned. They were all under seal and over due. The stipulation of the parties, as properly construed by the court, having been that the question of the liability of John W. Craighead's estate to the plaintiff, in view of his liability to the Farmers' Trust Company as indorser on the notes of R. R. Craighead & Bro., should be raised and passed upon, without regard to the pleadings, the only possible conclusion, in the light of all the authorities, was reached by the learned trial judge.

The assignments of error are overruled, and the judgment is affirmed.

BROWN v. KIDD.

(High Court of Errors and Appeals of Mississippi, 1857. 34 Miss. 291.)

In error from the Circuit Court of Jasper County; Hon. John Watts, judge.

HANDY, J., delivered the opinion of the court.

The plaintiff in error brought this action to recover a sum of money paid by him as a surety for the defendant.

It appears by the record that judgment had been rendered, in the state of Alabama, against the defendant, as principal, and the plaintiff and another person, his sureties, in November, 1846, on which an execution was issued in January, 1847, which was returned indorsed "Non-paid." A subsequent execution was issued on the 21st April, 1847, on which the sheriff returned that he had "levied on male slave Randall, as the property of Leroy A. Kidd, April 26, 1847"; and on the 2d May, 1848, a writ of venditioni exponas was issued, which was not returned. On the 28th April, 1849, a writ of fieri facias issued, which was not returned; and on the 14th August, 1851, another writ of fieri facias was issued, which was not on file, but appears by the execution docket to have been returned by the sheriff as follows: "Received 14th September, 1851. Superseded by writ of error November 3, 1851." And nothing further appears to have been done on the judgment.

It was shown, in behalf of the plaintiff, that on the 27th May, 1853, the plaintiff and the other surety each paid to the proper officer of the bank, the plaintiff in the judgment, one-half of the principal and interest due thereon; and the witness, who was the officer of the bank

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testified that, so far as he knew, the money was not made upon the executions issued.

It was proved, in behalf of the defendant, that at the date of the levy in April, 1847, a likely negro boy was worth $800 or $900, which was more than the amount of the judgment.

The case turned, in the court below, upon the question whether the judgment was to be considered in law as having been paid, by reason of the levy of the execution upon the slave of the defendant, before the payment by the plaintiff in this case to the bank; and upon that point the court instructed the jury, in effect, that if the jury believe, from the evidence, that there was a levy upon the property of Kidd, that was prima facie a satisfaction of the judgment, and, if the plaintiff paid the judgment after it was so satisfied, he paid it in his own wrong, and they should find for the defendant.

The verdict and judgment being for the defendant, the plaintiff sued out this writ of error.

It is insisted that the court erred in giving the instruction above stated; and this is the only question for consideration.

The rule is too well settled that a levy upon personal property is prima facie a satisfaction of the execution levied to admit of controversy. And the reason of the rule is that by the levy the defendant is in law deprived of his property, which, until the contrary is made to appear, is presumed to have been disposed of by the sheriff; and whether it is applied by the sheriff to the payment of the execution or not, it operates as a satisfaction in law. This rule applies as well to parties collaterally interested in the satisfaction of the execution, as the plaintiff in this case, as to the plaintiff in the execution levied, and it operates as a discharge of the defendant from the judgment, unless the presumption of satisfaction be destroyed by sufficient proof.

It is said that an amotion of the levy is shown in this case, by the fact that an execution was issued in August, 1851, which was returned "superseded by writ of error." But it will be observed that the levy insisted upon was made in April, 1847, under writ of fieri facias, and that the writ of venditioni exponas, issued for the purpose of selling the slave levied on, was never returned. No disposition is, therefore, shown of that boy. It is true that a subsequent writ of fieri facias was issued in 1851. But it does not appear upon what ground that writ was issued; and if it could be presumed that it was issued upon proper showing that the judgment had not been satisfied by the previous levy, yet that writ appears to have been superseded, and a writ of error prosecuted to it, which is not shown to have been disposed of. So that the presumption that the judgment had not been satisfied, arising from the fact of the issuing of the last execution, is destroyed by the fact that execution was matter of contest, and its regularity does not appear to have been determined.

Under the circumstances shown by the record, we think that the judgment is correct, and it must be affirmed.

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ANGROVE v. TIPPETT.

(Court of Queen's Bench, 1865. 11 L. T. [N. S.] 708.)

This was a case stated upon a plaint in the County Court of Cornwall.

The particulars stated the plaint to be as follows: "To amount of your acceptance of my draft for £40., dated 28th Oct., 1856, payable three months after date, for your accommodation, together with interest and expenses thereon, paid by me to the holder thereof."

The defendant had pleaded the statute of limitations.

It appeared that in October, 1856, the plaintiff accepted the bill of exchange above mentioned for the accommodation of the defendant, and that the bill in due course got into the hands of one Keavan, who sued the acceptor (the present plaintiff) for the amount, judgment being signed in July 1858, Tippett being not aware of the proceedings. The amount was paid by the present plaintiff within six years of the time of the entering the plaint in the present action. The County Court judge gave judgment for the plaintiff.

H. T. Cole appeared for the defendant (the appellant), and contended that the statute of limitations commenced running against the plaintiff from the time when the bill became due, which was more than six years before the entering of the plaint in the County Court. [CROMPTON, J. Surely the time runs from the date of payment. How is he injured until he is called upon to pay?] He could have taken up the bill for honor at the time it became due. [BLACKBURN, J. But he did not do so and he had no claim against the defendant until he actually paid the amount.] But it is a plaint upon the bill, which appears to be over six years due. [BLACKBURN, J. The plaint shows it is for money paid.] Webster v. Kirk, 17 Q. B. 944, is in point.

CROMPTON, J. This is a well-known cause of action, and it is well settled that the action cannot be brought until the party has paid the money. There is, in fact, no cause of action until he has done so, and therefore the statute of limitations does not apply in this case.

Judgment for the plaintiff, with costs.[8]

[8] Accord: Thayer v. Daniels, 110 Mass. 345 (1872); Collinge v. Heywood, 9 A. & E. 633 (1839); Bullock v. Campbell, 9 Gill (Md.) 182 (1850); Barnsback v. Reiner, 8 Minn. 59 (1863); Rucks v. Taylor, 49 Miss. 552 (1873); Walker v. Lathrop, 6 Iowa, 516 (1858); Godfrey v. Rice, 59 Me. 308 (1871).

It would seem that the statute had run in favor of the principal against the creditor in Huntley v. Sanderson, 1 C. & M. 467 (1833), and also in Reynolds v. Doyle, 1 M. & G. 753 (1840).

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APGAR'S ADM'RS v. HILER.

(Court of Errors and Appeals of New Jersey, 1854. 24 N. J. Law, 812.)

This was a writ of error to the Supreme Court to remove the judgment obtained in that court by the defendant in error against the plaintiffs. The suit below was an action of assumpsit, upon trial before Justice Potts, in the Hunterdon circuit in December, 1852. The plaintiff below proved that he, with Jacob Apgar, the intestate of the defendants below, and one Peter R. Fisher, signed a note to Tunis Melick, or order, for $700. Fisher signed the note first, and Apgar and Hiler after him, and opposite their names the word "Securities" was written by Apgar. It was proven by Henry Johnson that Apgar solicited and procured Hiler to sign the note as surety, and that in such solicitation he said, "If you will sign it, it will be a great accommodation to us, and you shall never pay one red cent." Apgar and Fisher were partners in business. A suit was brought, and a judgment obtained upon the note, against all these promissors, and the debt and costs made out of Hiler, the plaintiff below.

The court, among other things, charged the jury as follows:

"Two things appear to be certain—first, that Apgar prevailed on Hiler to sign the note as security; and, second, that he promised, if he would do so, he should be saved harmless; that is, should not have to pay one red cent. If you believe that this assurance was the consideration of the execution of the note by Hiler, it is equivalent to a promise that he would stand between him and loss, and binds Apgar for any money Hiler had to pay on it; for if Apgar, by his sole agency and solicitation, and as a matter of favor to himself, and with an assurance that no loss shall be sustained, procured Hiler to become additional security with himself, he puts himself, as to Hiler, in the situation of a principal; that is, the second security stands in relation to the first security on the same footing as a second indorser, who, if he has to pay the money, may collect it of the first indorser. It therefore follows that, if you believe Johnson's testimony, Apgar's estate is bound to pay the whole of this claim."

To this charge of the court the defendants excepted, and prayed a bill of exceptions.

The verdict was for the plaintiff below, for the whole amount of debt and costs paid by him, with the interest.

The opinion of the court was delivered by

THE CHIEF JUSTICE. Jacob Apgar, in his lifetime, and Philip Hiler, the defendant in error, on the fourth of September, 1844, became parties to a promissory note in the following form:

"One year after date, with interest, we, or either of us, promise to

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pay Tunis Melick, or order, the sum of seven hundred dollars, value received, without defalcation or discount.

"[Signed] Peter R. Fisher.
"Jacob Apgar,
"Philip Hiler, } Sureties."

In August term, 1846, Melick, the payee, recovered judgment in the Hunterdon circuit, against Fisher, Apgar and Hiler, the three makers of the note, for the amount due thereon, with costs. Part of the debt was paid by Fisher. The balance (amounting, with costs, to $549.88) was paid by Hiler. To recover the amount thus paid, action was brought.

Upon the trial of the cause it became a material inquiry in what character, and for what purpose, Hiler became a party to the note; whether Fisher and Apgar were the principal debtors and Hiler security—or whether Fisher was the principal debtor and Apgar and Hiler joint securities—or for whom, and in what precise character, Hiler became security.

Upon the face of the note, Apgar and Hiler appear as securities, and Fisher as the principal. In the absence of all extrinsic evidence, Apgar and Hiler would be regarded as co-securities, and, if the debt were paid by either, he would be entitled as against his co-security to contribution.

But it was clearly competent for the plaintiff to show in what relation the several signers of the note stood to each other—as to the payee they were all principals, and all bound jointly and severally to pay the debt. But their relation to each other depended, not upon the form of the note, nor whether their names were signed first or last to the note, but upon the character in which they became parties to the note, and the agreement or contract made among themselves at the time of signing. This was matter in pais, proper to be proved by parol. And though the memorandum imports prima facie that Apgar and Hiler were joint securities, it was competent for the plaintiff to show whether they were securities for Fisher alone, or for each other also. Kean v. Davis, 21 N. J. Law, 683, 47 Am. Dec. 182; Robison v. Lyle, 10 Barb. (N. Y.) 512.

This the plaintiff on the trial attempted to do. He called a witness, who testified that Hiler signed the note at Apgar's request, that it was Apgar and Fisher's note, that Apgar said it would be a great accommodation to them, and that Hiler should never pay one cent. The credibility of the witness was properly submitted to the jury. If the evidence was believed, it showed either that Fisher and Apgar were the principal debtors, and Hiler alone the security; or, if Apgar was security for Fisher, still that Hiler signed, not as joint security with Apgar, and liable with him to contribution, but as security for Apgar also. He stands to Hiler in the relation of principal to a surety. It

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is clear from the evidence that in any event Apgar was to stand between Hiler and loss.

I. If the jury believed that the note was the debt of Fisher and Apgar, and that Hiler alone was security, he is entitled to recover from his principals the amount paid for their benefit. The action is properly brought against the administrators of Apgar. Whether the original note be joint or several, the liability of the principals to the surety is several. Each is liable for the whole amount.

If the surety is bound for several principals, he is entitled to proceed against each of them for the recovery of the whole of what he has paid. Each of the principals is debtor of the whole of the debt in favor of the creditor; and the person being surety for each of them has, by paying the debt, liberated each of them from the whole, and consequently has a right to conclude in solido against each of them for the reimbursement of the whole of what he has paid, with interest, from the day of his demand. The rule prevails both in the civil and common law. Burge on Suretyship, 364; Duncan v. Keiffer, 3 Bin. (Pa.) 126; 2 Greenleaf's Ev. § 115, note 7.

II. If, on the other hand, the jury believed that Fisher alone was the original debtor, and Apgar his security, but that Hiler became security at Apgar's request, and upon his promise of indemnity, still the plaintiff was entitled to recover in this action.

The evidence was not offered to show an independent contract of guaranty against loss, but simply the character in which Hiler became a party to the note. This, as has been shown, may be proved by parol.

Nor was the evidence offered to prove a promise by Apgar to pay the debt of a third person, and which must therefore be in writing. It was designed to show an original, equitable obligation on the part of Apgar to refund the money, growing out of the circumstances under which Hiler became a party to the instrument, and consequently liable to pay the debt.

In either aspect of the case the charge of the court was right, and if the jury believed the witness, the verdict, so far as this question is concerned, is clearly in accordance with law and equity. Whether the claim had been satisfied by Fisher, the principal debtor, or by Apgar in his lifetime, and what balance, if any, remained due, were questions peculiarly within the province of the jury, and are in no wise involved within the bills of exceptions. The whole charge of the judge is not before us, and this court cannot assume that he designed, by any casual remark upon this part of the case, to withdraw from the jury the control of questions of fact clearly within their province. The charge, properly considered, admits of no such interpretation.[9] * * *

[9] A portion of the case relating to the amount recoverable has been omitted.

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There is no error in the record, and the judgment should be affirmed.

Judgment accordingly.

For affirmance—THE CHANCELLOR, THE CHIEF JUSTICE, and Judges ARROWSMITH, ELMER, HAINES, OGDEN, VALENTINE, WILLS, CORNELISON, HUYLER, and RISLEY—11.

For reversal—None.[10]

RIDDLE v. BOWMAN.

(Superior Court of Judicature of New Hampshire, 1853. 27 N. H. 236.)

Assumpsit for money had and received, and money paid. In the specification filed the plaintiff claimed $4,122.90, for money by him paid in discharge of a note for $3,800, dated September 12, 1844, signed by the plaintiff and defendant, and James McQuesten and G. W. Morrison, and also in payment of $7 for a bill of costs in an action upon said note. Said note was payable to the Derry Bank in one year, with interest.

The defendant pleaded the general issue, accompanied with a brief statement. It appeared that prior to September 3, 1842, the Derry Bank held an execution against one Ephraim Stevens, Jr., and the defendant, and two other persons. A note was made, dated September 3, 1842, for $3,800, payable to said bank in two years, with interest after, signed by the said Bowman, Ephraim Stevens, Jr., James McQuesten, Geo. W. Morrison, and the defendant, in the order in which the names stand here, and the amount of said note, deducting the interest for two years, went to the benefit of said Bowman, the defendant, and said Stevens. The discount and paid note was with the view and purpose of getting means to discharge said execution, and the same was discharged.

On September 12, 1844, a note of that date was signed by John D. Riddle, the plaintiff, and the defendant, and G. W. Morrison, and James McQuesten, in that order, and payable to the Derry Bank in one year, with interest, and said note was paid to and received by said bank, in discharge of said note of September 3, 1842. The defendant paid the interest on the note of September 12, 1844, to September 12, 1845.

On the 7th day of April, 1846, the plaintiff paid upon said note the sum of $1,100, and on the 30th day of December, 1846, he paid the further sum of $650, and on the 21st day of April, 1847, he paid the sum of $2,372.90 for the balance thereof.

It appeared that on the 17th day of September, 1842, Ephraim Stevens, Jr., executed to the plaintiff a mortgage deed of three several tracts of land, therein described, a copy of which deed made a part

[10] Accord: Clay v. Severance, 55 Vt. 300 (1883).

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of this case; the object of said deed being to secure said Riddle from loss in consequence of signing said note of September 3, 1842, as by reference thereto more particularly appears.

At the date of said deed of mortgage, Frederick G. Stark held a mortgage deed executed to him by said Stevens, covering a part of the lands embraced in the mortgage deed of Stevens to the plaintiff. On the 18th day of September, 1844, the plaintiff paid to said Stark the sum of $703.31, the amount due on said mortgage, and took an assignment thereof, having before that time, and before the time of foreclosure, tendered to said Stark the amount due on said mortgage.

It appeared that said Ephraim Stevens, Jr., died in 1849, and left a widow, and that she was entitled to dower in the lot of land embraced in the mortgage deed of the said Stevens to the plaintiff, and known as the Red House lot; and the plaintiff paid her for her right in said lot the sum of $275, in March, 1850.

It was admitted that the two lots or portions of land contained in said deed of mortgage of Stevens, Jr., to the plaintiff, known as the Bald Hill and Pond lots, were sold at auction by the plaintiff for the sum of $1,725.73, on the 2d day of January, 1846, and that sum was realized therefor.

On the 20th day of November, 1844, the plaintiff executed to one William Hall a deed of a portion of the land described in said mortgage deed of Stevens, Jr., to the plaintiff, for the consideration named therein. The sum realized from the sale to Hall of the Red House lot was $1,500. And no evidence was offered of any facts showing a foreclosure of either of said mortgages by the plaintiff, further than results from the foregoing statement of facts.

The execution of the deed of mortgage of Ephraim Stevens, Jr., to F. G. Stark, and also of said Stevens to the plaintiff, and also the deed of the plaintiff to Wm. Hall of a part of the land mortgaged to him by Stevens, offered in evidence by the defendant, was admitted for the purposes of the trial.

The plaintiff paid interest upon the note of September 12, 1844, cast upon banking principles. One question made at the trial was as to the interest which the plaintiff is entitled to recover upon the sums paid by him upon said note.

A verdict was taken, by consent, for the plaintiff, for a sum assented to by the parties, upon which judgment was to be rendered, or the same to be amended, and judgment to be rendered thereon, or the same to be set aside, and judgment entered for the defendant, Bowman, according to the opinion of this court upon the foregoing case.[11]

WOODS, J. This action was commenced to recover the amount of a note for $3,800, signed by the plaintiff, as surety for the original defendant, Bowman, and one Stevens, to the Derry Bank.

[11] The arguments of counsel have been omitted.

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The plaintiff paid the amount to the bank, excepting a part of the interest, in the several instalments. The plaintiff, then, is entitled to recover of the defendant, Stevens being dead, the amount paid in discharge of the note, unless he had received moneys for which he is obliged to account. Stevens conveyed to the plaintiff, in mortgage, several tracts of land, to indemnify him generally for signing the note. A portion of the land thus mortgaged was incumbered by a mortgage to F. G. Stark, and upon the death of Stevens, the mortgagor, his widow claimed dower in another portion. Two of the lots of land embraced in the mortgage were sold by the plaintiff for $1,725.73, and another lot for $1,500. If no other facts appeared in the case, then the plaintiff, we think, would be legally bound to account for those two sums, amounting in the aggregate to $3,225.73, upon the sum paid by him to the bank.

But he paid to Stark the amount of the mortgage to him, being $703.31. And he also paid to Mrs. Stevens, for her right of dower in the land, $275. And there is no suggestion that that sum was not its fair value. The plaintiff, then, is entitled to have those two sums, amounting to $978.31, deducted from the sums realized by him upon the sale of the lands in question, leaving a balance of $2,247.42, for which the plaintiff is to account. Interest should be added to the receipts and payments. Simple interest is to be cast upon the several payments made by the plaintiff, from the date of each payment respectively. And simple interest is also to be allowed upon the several sums received by him, from their respective dates.

The fact that the plaintiff, upon the payment of the Stark mortgage, took an assignment of it, cannot relieve him from his accountability for the residue of the money realized by him for the land sold, over the amount of that mortgage. The same remark is applicable to the payment made for the dower, and the conveyance taken of it. The title to the residue of the estate, beyond the value of the mortgage and dower, was holden as collateral security, and must be accounted for accordingly. Moreover, he is not relieved from his accountability for what he realized from the sale by the fact that it does not appear that the Stevens mortgages had been, at the time of the sale, foreclosed. By the mortgage, the plaintiff, or his grantee, can hold the possession of the land, free from all right to redeem by any one, and all risk of ejectment, until the entire bank debt shall be paid, or at any rate until he is fully indemnified for having signed the note in question. And having given his deed of warranty to his grantee, he is thereby only liable for what he received of him, and interest thereon, in any event. But before he is obliged to surrender his title and possession, he will receive such sum as will at least indemnify him against his liability by reason of his covenants of warranty. There is no equitable ground, therefore, as we conceive, upon which he can be holden not liable to account for the money realized upon the sales made.

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The plaintiff is entitled to judgment, therefore, for the balance which shall be found due him, upon the principles before stated.

Judgment for the plaintiff.[12]

BUCKNER v. MORRIS.

(Court of Appeals of Kentucky, 1829. 2 J. J. Marsh. 121.)

ROBERTSON, J. This was a suit by Morris against Buckner, as administrator, and his securities, for a devastavit.

Two questions are presented by the record.

(1) Whether Buckner had a right of retainer, for a debt due to himself, for $1,296.53?

(2) Whether Buckner should be charged with a debt to Brownson & Co., with which he had been credited in his settlement with the county court?

Buckner had sued the heirs of his intestate, in chancery, and obtained a decree for $1,296.53, in 1824, with which he charged the assets in his hands. This, together with the debt to Brownson & Co., which he claimed to have paid, and for which the county court gave him credit, made the administrator a creditor by exhausting the assets.

Morris having satisfied a judgment obtained against him, as security, in a note for the intestate, recovered a judgment for the amount against Buckner, as the administrator, in 1826, and issued a fieri facias, which was returned "Nulla bona." He insists that his debt was of dignity superior to that of the administrator. We think differently. Buckner's was only a simple contract debt. The decree which he obtained against the heirs ascertained the amount due him, and is evidence of the debt against the heirs, who were parties, one of whom Morris is. But, as against the assets, the dignity of the debt was not enhanced by the decree. In this respect, the only effect of the decree was to prove the debt. Buckner had a right to retain the amount, as soon as it was ascertained by the decree, unless debts of higher grade than this could be shown. Morris' debt was not superior to Buckner's. Each was a simple contract debt. When Morris discharged the bond in which he was security, the law implied an assumpsit by the administrator, to pay him the amount. Five years would bar an action for it. A bill in equity, or motion, or an action of assumpsit, were the only remedies for recovering it. It could derive no advantage from the dignity of the debt, from the payment of which it resulted. The specialty had been canceled. It no longer possessed any obligation. It was "functus officio." It transferred none of its dignity to Morris. His claim for indemnity is of no higher grade than it would have been if he had paid only a simple contract debt. This is expressly decided in the case of

[12] Accord: Whipple v. Briggs, 30 Vt. 111 (1858).

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Justices of Mason County v. Lee, 1 T. B. Mon. 249. Many other authorities might be cited, but the proposition is so nearly self-evident as to render an array of cases unnecessary.

As to the second point, we have as little difficulty. It is alleged that the debt, for paying which Buckner had been credited in his settlement, had been paid by the intestate, and that the administrator held the receipt which would show it. He was notified at the bar, during the trial, to produce the receipt. He lived not more than fifty yards from the court-house, but objected to the notice for want of time. He insisted on being indulged until the next day. The court, considering this unreasonable, proceeded with the trial, and permitted parol evidence to be given of the contents of the receipt. There can be no valid or reasonable objection to the course adopted by the court. The indulgence demanded by Buckner was unreasonable.

In this the court was right. But in deciding that Buckner had no right to retain for his own debt, because Morris' was of superior dignity, the court erred. Whether the jury would have found a verdict as it did for Morris, if the court had sustained Buckner's right of retainer, this court cannot know; and therefore, for this error of the circuit court, the verdict ought to have been set aside, and a new trial awarded.

The jury also erred in not finding the amount of assets.

If, therefore, there had been any judgment on the verdict, it would be reversed. But there is no judgment in the record.

Wherefore the appeals must be dismissed.[18]

GIESEKE v. JOHNSON.

(Supreme Court of Indiana, 1888. 115 Ind. 308, 17 N. E. 573.)

From the Knox Circuit Court.

ZOLLARS, J. J. H. Gieseke and appellee executed a promissory note to the First National Bank of Vincennes in which was a stipulation for the payment of attorney's fees for its collection.

Although not shown upon the face of the note, appellee was surety for Gieseke. Before the maturity of the note Gieseke died, and appellant was appointed administrator of his estate. After the maturity of the note appellee paid it, but paid no attorney's fees. Subsequently he filed his claim against the estate of Gieseke, stating therein the amount thus paid, setting out a copy of the note, and claiming attorney's fees for its collection. The court below allowed the claim, and included in its judgment $15 as such attorney's fees.

[18] The surety on a note is entitled after payment to reimbursement from the purchaser of the property for which the principal gave the note in suit; the defendant purchaser having agreed with the vendor to discharge the note. Rodenbarger v. Bramblett, 78 Ind. 213 (1881).

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Is appellee entitled to recover such attorney's fees? That is the only question for decision here.

We are satisfied that he is not. One sufficient reason why he is not is that he is entitled to recover the amount paid to the bank, with interest, and no more. His right of action is for indemnity only, and rests upon an implied promise on the part of the principal. Hence it is that a surety cannot maintain an action against his principal until he has paid something, and then only for the amount paid, with interest. In this state the rate of such interest is regulated by statute. Rev. St. 1881, § 1219; Brandt, Suretyship and Guaranty, §§ 176, 178; Bonney v. Seely, 2 Wend. (N. Y.) 481; Eaton v. Lambert, 1 Neb. 339; Blake v. Downey, 51 Mo. 437; Succession of Dinkgrave, 31 La. Ann. 703; Kendrick v. Forney, 22 Grat. (Va.) 748; 1 White & Tudor, Leading Cases in Eq. (4th Am. Ed.) 225, and cases there cited; Id. 156, and cases there cited.

To say that, upon and by reason of the payment of the note by the surety, equity subrogated him to the rights of the creditor, and to go further and say that by reason of such subrogation he might maintain an action upon the note against the principal, would not aid the appellee in this case; for the action would still be for indemnity, and the amount of his recovery the amount which he paid to the bank, with interest. Sheldon, Subrogation, § 105, and cases there cited.

It is there said: "The subrogation of a surety will not be carried further than is necessary for his indemnity. If he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him." In the case of Kendrick v. Forney, supra, in speaking of the rights of a surety to be subrogated to the rights and securities of the creditor, it was said: "He has no equity to be subrogated to the rights and securities of the creditor against the debtor for what he has not paid for him, but only for what he has paid for him. So that, upon the principle of subrogation, as upon the implied contract of indemnity, the surety is not entitled to recover from the principal a greater amount than he has paid for him. He has an equity to be subrogated only for his indemnity in cases where the doctrine of subrogation will apply."

There was no subrogation or equitable assignment in the case before us for the one sufficient reason, without attempting to give others, that there is no equity requiring either, as the bank held no securities, funds, liens, or equities against the principal debtor, or as a means of enforcing payment from him. And, as we have said, in substance, in this case appellee could not be benefited by any supposable subrogation, for the reason that he could recover nothing but a personal judgment against the principal maker of the note, and such judgment could not exceed in amount the sum paid by him to the bank, with interest.

By the terms of the note the makers agreed to pay to the bank reasonable attorney's fees for its collection; but the principal maker of

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the note did not thereby agree to pay to appellee, as his surety, such attorney's fees, nor any other amount. As already stated, the rights of the surety and the obligation of the principal, as between themselves, in a case like this, rest upon an implied promise on the part of the principal maker which arises under the law for the indemnity of the surety.

The action by appellee, the surety, against the principal maker, is not upon the note, but upon the implied promise of indemnity. And hence it is that his right of action is not limited by the statute of limitations applicable to the note, but by the statute of limitations applicable to accounts and contracts not in writing, which, in this state, is six years. And hence, too, it is not necessary, in a case like this, under our statute, which requires that, when any pleading is founded on a written instrument or on account, the original or a copy must be filed with the pleading, that the note paid by the surety, or a copy, shall be filed with the complaint in an action by him against the principal for indemnity. See Sexton v. Sexton, 35 Ind. 88; Arbogast v. Hays, 98 Ind. 26; Lilly v. Dunn, 96 Ind. 220, 227; Harker v. Glidewell, 23 Ind. 219; Cameron v. Warbritton, 9 Ind. 351; White v. Miller, 47 Ind. 385; 1 White & Tudor, Leading Cases (4th Am. Ed.) p. 145; Neilson v. Fry, 16 Ohio St. 552, 91 Am. Dec. 110.

Upon any view that may be taken of the case, the attorney's fee should not have been allowed, and to that extent the judgment is too large.

If within 60 days appellee shall enter a remittal of $15 as of the date of the judgment, the judgment will stand affirmed, at his costs; otherwise, reversed, at his costs.[14]

DAVIS v. BOARD OF COM'RS OF STOKES COUNTY et al.

(Supreme Court of North Carolina, 1875. 72 N. C. 441.)

Civil actions, originally instituted in the Superior Court of Stokes County, and thence removed to the Superior Court of Forsythe County, and tried by Wilson, J., at Fall Term, 1874.

The two suits, 1 and 2, involving the same points, were agreed to be tried together by his honor, without the intervention of a jury, who found the material facts to be:

(1) That the county of Stokes, by her justices, a majority being present, at June term, 1861, authorized the borrowing from the Branch Bank of Cape Fear, at Salem, $10,000, in four equal installments of $2,500 each, on the bonds of the county, to be executed by their chair-

[14] See Beville v. Boyd, 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318 (1897), where, upon payment by a surety of the face of a note and indorsement of the note to him, he was allowed to recover attorney's fees.
On the same point see note, 11 H. L. R. 200.

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man and five associate justices, for the purpose of equipping four military companies, of which the Brown Mountain Boys was one.

(2) The court appointed an agent for each company, to carry into effect the order; M. T. Smith being agent for the Brown Mountain Boys, and Wm. Flynt agent for the Town Fork Invincibles.

(3) At their September term, 1861, a majority of justices being present, the court authorized an additional $1,000 to be borrowed of the same bank for each of the companies.

(4) The first installment of $2,500 was drawn by the agent, M. T. Smith, as to a part thereof, to wit, $325, and the balance by Milton Smith, the captain of the Brown Mountain Boys, who paid the money to one Fries for cloth for the company, and filed his vouchers for such payment with M. T. Smith, the county agent. Only $500 of the $1,000 was applied by the agent himself for the use of the company.

(5) Bonds of the county, signed by J. J. Martin, chairman, and by sureties, were executed for these sums severally, and the bond for the larger sum was several times renewed at the bank before payment.

(6) At March term, 1862, the justices, a majority present, authorized money to be borrowed from individuals to pay the debt due to said bank.

(7) At the ensuing June term of the court, the authority was renewed, and money again authorized to be borrowed from individuals.

(8) On the 10th day of June, 1862, W. Flynt had executed a bond with security to John F. Poindexter, the defendant in the sum of $3,050, for which the agent, M. T. Smith, received the money and sent it by Flynt to the bank, who paid the debt of $2,500, and the debt of $500, the bonds being produced in evidence.

(9) Poindexter subsequently obtained a judgment in the superior court against Davis, the plaintiff, in this action, and the other sureties, for the $3,050 loaned the county to pay the bank debt. For this recovery, Davis has paid $500. After this payment, Poindexter assigned his judgment to one James Davis.

(10) Before Poindexter sued on his debt, he presented the claim to the board of commissioners of Stokes county, who audited the same and allowed it.

The foregoing facts relate chiefly to the first case (No. 1) but also pertain to the points raised in case No. 2, the second, to which his honor also found the following additional facts:

That Flynt, as the county agent of the other company, the Town Fork Invincibles, borrowed of said bank $2,500. This debt was paid by money borrowed of the plaintiff, Wm. Davis, who knew all the circumstances attending the borrowing the money from the bank and to what purposes said money was to be applied.

The case states that the plaintiff, on the trial before his honor, abandoned his causes of action against the board of commissioners.

His honor, upon the foregoing facts, adjudged: That the bank debts referred to were contracted by the county of Stokes for war purposes,

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in aid of the Rebellion. That the money obtained from the plaintiff, Davis, and also that from Poindexter, was procured and used for an innocent purpose, which was neither calculated nor intended to aid the Rebellion. That the acts of the General Assembly, under which the justices of Stokes borrowed the money, were passed expressly to aid the Rebellion, and were therefore void, and conferred on the county no authority to borrow money for any purpose. That the auditing Poindexter's debt by the county commissioners on the 3d of January, 1870, did not place the county under a legal obligation to pay it. And therefore the plaintiff cannot recover in either of his actions.

Judgment accordingly, from which plaintiff appealed.

READE, J. In Poindexter v. Davis, 67 N. C. 112, it was decided that a bond given for money loaned to pay off a debt which had been contracted in aid of the Rebellion was not affected by the illegality of the original debt. In that case the county court of Stokes county had borrowed money of a bank to equip soldiers for the Confederate service. That was of course illegal. The county court subsequently borrowed money of Poindexter to pay off the bank debt. And we held that the illegal consideration of the bank debt did not affect the consideration of the Poindexter debt. The county court gave a bond to Poindexter for the money borrowed of him, and the present plaintiff, Davis, was a surety upon that bond; and the Poindexter suit was against him, and a recovery was had against him, and he has paid a part of the debt, and now seeks to compel the county of Stokes to reimburse him the amount he has paid, and to exonerate him from the balance by the payment thereof by the county, upon the ground that the county is primarily liable.

There is no doubt of the rule that the principal is responsible to the surety for any liability incurred by the surety at the request of the principal. But that rule is subject to exceptions. A surety for an idiot, infant, feme covert, etc., may be liable when the principals are not liable either to the obligee or to him. So a surety for a corporation, in a transaction where the corporation has not the power to contract, may be liable when the corporation is not. And a corporation may exceed its powers where there is no moral turpitude, as a board of county commissioners contracting a debt to build a church, a very praiseworthy object, but still, it is beyond their power, and they would not be bound, while their surety would be. Grant, then, that the borrowing of money of Poindexter by the county court of Stokes county to pay the bank debt was not tainted with political turpitude, yet the county court had no power to borrow the money, or to give the bond. It may be true that there were statutes of a rebel Legislature which authorized it; but such statutes were void. But while the county court had no power to give the bond, the plaintiff, Davis, had the power to do it; and, there being no moral or political turpitude, he is bound by it. But when he calls upon the people of Stokes county to reimburse or indemnify him, they have the right to answer that he was not their surety; that the

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county court was not their agent with power to contract that debt, and therefore they are not liable.

It may seem hard—it is hard—that the plaintiff should have to bear the whole burden of what was a common cause; and the "pomp and circumstance" of equipping soldiers for the field lost much of its glory when tarnished by the refusal to pay for it; but still there is no obligation which the courts of this government can enforce.

The principles governing this case are discussed more at large in Weith & Avents v. City of Wilmington, 68 N. C. 24, and a number of cases in this court within the last few years growing out of transactions in aid of the Rebellion, to be found collected in 4 Bat. Digest.

The other branch of this case is governed by the same principles as are enunciated in this branch.

There is no error.

PER CURIAM. Judgment affirmed.[15]

GODFREY v. RICE.

(Supreme Judicial Court of Maine, 1871. 59 Me. 308.)

On report.

Assumpsit, one count for money had and received, and one for $2,712.91 laid out and expended for the use of the defendant. The writ was dated November 1, 1870.

Butler & Co., Bartlett's indorsees, paid the note to the holder, and on March 17, 1863, commenced an action against Bartlett as their indorser on the note. The action was entered at the April term, 1863. At the October term, 1870 (Bartlett having deceased and the present plaintiff having appeared as his administrator), judgment was rendered against the present plaintiff for $2,712.91, which was satisfied by the plaintiff out of his intestate's estate.

The remaining facts sufficiently appear in the opinion.

APPLETON, C. J. On 2d May, 1859, Woodbury & Grover gave their note, payable in a year from its date, for $1,500, to Joseph Bartlett, or order, by whom it was indorsed to James H. Butler & Co. The note was discounted for the benefit of Butler & Co. upon their indorsement; but before its maturity, Woodbury & Grover having failed, it was protested and the indorsers seasonably notified.

On 17th March, 1863, Butler & Co., having been compelled to take up the note, commenced a suit against Joseph Bartlett, the plaintiff's intestate, as indorser, in which, after a long and tedious litigation, they recovered judgment at the October term, 1870, in Penobscot county, for the amount of debt and the accruing costs, which this plaintiff, Bartlett having deceased, paid out of the estate of his intestate.

[15] Affirmed on rehearing in 74 N. C. 374 (1876).

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Assuming, in the discussion of the question presented, that the defendant was a member of the firm of Woodbury & Grover, which the plaintiff offers to prove, is this action maintainable against him?

It is obvious that Butler & Co., if the present holders of the note, could not recover upon it, inasmuch as the statute of limitations, if pleaded, would be a bar to the maintenance of the suit. For the same reason the plaintiff, as the present holder, must fail in a suit on the note.

As the payment was made by plaintiff, long after the statute of limitations would constitute a bar to the note, if it had been voluntary, it would not have entitled him to recover. Wheatfield v. Brush Valley Township, 25 Pa. 112.†

But it was not voluntary. It was by compulsion of legal process. When the suit was commenced, the note was in force, though when the payment was made in satisfaction of the judgment recovered it had long been barred by the statute.

It is very clear that the indorser had no right of action against the maker for money paid until payment, and the question now presented is whether he had then.

In the case of co-sureties, it is well settled that one surety, when his payment is compulsory, may recover the amount paid of his co-surety, notwithstanding the statute of limitations would have been a bar at the time of such payment. In Crosby v. Wyatt, 23 Me. 156, the suit was commenced against the surety before the statute of limitations attached, but the judgment and payment thereon were subsequent thereto. The plaintiff's right of action was held to arise when the payment was made by him on such execution. "It is no sufficient defense, therefore," observes Shepley, J., "for the defendant to show that he could not have been compelled by law to pay any part of that note, when it was paid by the plaintiff; for that would not show that he had not broken his implied contract with the plaintiff to save him from loss, by his being compelled to pay that half of the note which he ought himself to have paid." In Norton v. Hall, 41 Vt. 471, the payment was made more than six years after the maturity of the note by the surety, and the principal was held liable. In that case, when the note became due, the surety being unable to pay it, the bank holding it demanded additional security, which he gave, and which the bank held until the note was paid by such security, which was more than six years after

† A mere volunteer is not a surety, and his payment of the debt of another does not ipso facto give rise to a right to reimbursement. Carter v. Black, 20 N. C. 425. (1839).

But the payment may be subsequently ratified and assented to by the person for whose benefit it has been made, and, if accompanying this ratification there is an express promise to reimburse, that promise should be enforceable, as any principal is liable to reimburse his surety. But without either such subsequent promise or antecedent request no recovery is possible. Bevan v. Tomlinson, 25 Ind. 253 (1865).

A contrary view (denying the efficacy of a subsequent promise based on a past consideration unrequested) has been held in Thomson v. Thomson, 76 App. Div. 178, 78 N. Y. Supp. 389 (1902).

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its maturity. It was held that, the maker having failed to pay the note when due, the surety had a right to make this arrangement with the bank, and that the maker could not avail himself of the statute of limitations in a suit brought within six years from the payment of the note, the payment not being voluntary. "It was the duty," remarks Wilson, J., "of the defendant, at all times, so long as the plaintiff remained surety, by force of the liability incurred by signing or indorsing the note, to indemnify the plaintiff by paying the note. The neglect of the defendant to pay the note when it became due compelled the plaintiff to give the bank additional security, and to request further time of payment. All this was done while both plaintiff and defendant were liable to pay the note."

Where the last indorser in part pays the note indorsed, he can recover of his indorser, in an action for money paid, laid out, and expended, the amount so by him paid, notwithstanding the note remained in the hands of the indorsee, not fully paid. Butler v. Wright, 20 Johns. (N. Y.) 367. So a second action will lie against the first indorser for money paid on account of the note after a former action and recovery for money previously paid. Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323. And such action may be maintained before the final payment of the note, and while it remains in the hands of a third person as the legal holder thereof. "The moment the surety has been compelled to pay anything on account of the suretyship, he may bring," says Walworth, Ch., "an action for money paid, and the law raises a promise to repay the amount; but it does not raise a promise to repay any amount until he has been compelled to pay more, as it cannot then be known that the principal himself will not prevent the necessity of further payment." To the same effect is the decision in Rushworth v. Moore, 36 N. H. 189.

But the present is the case of an indorser against the maker. It was held in Cole v. Cushing, 8 Pick. (Mass.) 48, that the maker of a note, who has been committed to jail on a judgment in favor of the holder, is liable to be sued by an indorser, who pays the note to the holder, and that the indorser may bring his suit while the maker is in jail on the prior suit. The action for money paid, laid out, and expended will lie. Wild v. Fisher, 4 Pick. (Mass.) 421. In Pownal v. Ferrand, 6 B. & C. 439, the plaintiff, the indorser of a bill of exchange, having been sued by the holder and compelled to pay a part of it, sought to recover the money so paid of the acceptor. Lord Tenterden, C. J., said: "I am of opinion that the plaintiff is entitled to recover, upon the general principle that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is bound to pay it." "If I pay your debt," says Bayley, J., "because I am forced to do so, then I may recover the same, for the law raises a promise on the part of the person, whose debt I pay, to reimburse me." In Hubbly v. Brown, 16 Johns.

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(N. Y.) 71, Spencer, J., says: "We have regarded the indorser in the nature of a surety, and the maker of the note as the principal debtor."

Nor does it matter that the holder could not maintain an action on the note. When one of two makers of a note is discharged by the statute of limitations, and the other remains liable and pays the note, he is entitled to recover contribution of the former. Peaslee v. Breed, 10 N. H. 489, 34 Am. Dec. 178. The rule of law seems to be that when one of two or more co-promisors, without assuming any new ground of liability, continues liable upon his original contract, and is compelled, by virtue of such contract, to pay the debt of his co-promisors, in such case the equitable liability of the other co-promisors, for contribution, will still remain, notwithstanding such other co-promisors may be discharged by the operation of the statute of limitations from liability to the original promisee. Boardman v. Paige, 11 N. H. 432. So an action for money paid, laid out, and expended will lie at the suit of the last indorser against his prior indorser, for money paid the holder of the note, though such payment is but in part satisfaction of the same. Butler v. Wright, 2 Wend. (N. Y.) 369. In that case, it was held the cause of action accrued when the payment was made. The cause of action was not upon the note, but for the part-payment.

The maker of a note, payable to order, authorizes its indorsement and subjects himself to all the liabilities arising therefrom. It has been seen that the indorsee, making payments on an overdue note on account of his liability as such, may sue for the amount so paid, though the note is in judgment or in the hands of the indorsee, unpaid, and that his right of action accrues when the payment is made, when made before the statute of limitations constitutes a bar. The right of action arising upon such payment, it follows that the statute of limitations, as between the indorser thus paying and the maker for whose use the payment is made, commences running at the time of the payment. It is apparent, therefore, that, though the statute would be a bar if a suit were brought upon the note, it would not be if for money paid for the use of the maker, which it was his duty to have paid. If the payment is by legal compulsion, as upon a judgment in a suit commenced before the intervention of the statute, the same result would follow.

If the holder of the note of Woodbury & Grover had recovered judgment against the makers and the several indorsers, the last indorser, paying in whole or in part, could have recovered the amount by him paid of his prior indorser or the makers. If he collected it of an indorser, his right of action would not arise until payment. It would arise when he paid it, if the payment was by legal compulsion in a suit commenced before the statute attached. In this case, Bartlett, the plaintiff's intestate, could not have pleaded the statute bar in Butler's suit against him, for the suit was seasonably commenced. He could not avoid his liability. He could not sue the maker until he paid, and only for what he paid. If judgment had been recovered against him during the life of the note, but it had not been collected until within

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more than six years, from inability to find property, and it was then paid, the delay would not have prevented his recovery of the makers. So here the delay cannot defeat the plaintiff's equitable rights. He has been compelled to pay money for the use of the defendant. He could not avoid such payment. His right of action accrued in consequence of his payment and when it was made. The defendant's liability to him then first arose, and not before. He is not sued as the maker of the note, for that may be in the indorsee's hands, but for money paid to his use and for his benefit, which the plaintiff's intestate has been compelled to pay, and which it was the duty of the defendant to have paid. The statute commences running from the date of the payment, and not the date of the note.

The counsel for the defendant, in his able argument, relies upon the case of Luce v. McLoon, 58 Me. 325. It seems that on 28th April, 1855, A. G. Luce, the plaintiff's intestate, N. A. Farwell, and the defendant signed a note as surety for one Jackson, who on the same day gave a mortgage of certain goods to the defendant and I. K. Kimball to secure this and other notes. This mortgage they discharged October 1, 1855.

On the 29th of December, 1858, N. A. Farwell, one of the sureties, took up the note, and on 24th December, 1864, the plaintiff, as administratrix, paid him one-third of the amount, and on the same day commenced a suit against the defendant. It is obvious that she had no claim on the money counts against the defendant, as she had only paid her just contributory proportion.

The suit, if sustainable at all, could only be sustained because of the wrongful or fraudulent discharge of the mortgage, for the doing which the writ contained a special count. But the wrong for which redress was sought was done October 1, 1855. The right of action then accrued. But the suit was not commenced until 24th December, 1864, and it was then held to be barred by the statute of limitations. It will be perceived, therefore, that the decision does not affect the questions here presented. The plaintiff failed on the money counts because she was not entitled to recover anything. She had only paid her third. If the defendant owed a third to anybody, it was to Farwell, by whom the note had been paid. No suit could be maintained upon the note, because that had long been barred by the statute of limitations, and could not be offered to support the money counts, if the plaintiff then had it, which was not shown to be the case.

Whether the defendant, if liable, is to be held for the costs accruing in the litigation between the plaintiff's intestate and his indorsee, a litigation in which it does not appear that he had any interest, is a question which has not been presented for our consideration.

The result is that the indorser of a note may recover of the maker for any payment made upon the note after its dishonor, before the statute of limitation attaches.

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He may recover for any payment made subsequent to the intervening of the statute, if made by legal compulsion and upon a suit commenced before such intervention.

The statute of limitations commences running against the maker from the time of such payment or payments made by the indorser.

The case to stand for trial.

CUTTING, WALTON, DICKERSON, and DANFORTH, JJ., concurred.

HARLEY v. STAPLETON'S ADM'R.

(Supreme Court of Missouri, 1857. 24 Mo. 248.)

SCOTT, Judge, delivered the opinion of the court.

This was an action by a surety to recover from his principal a sum of money he was compelled to pay as such surety. The plaintiff signed a note as surety, given to secure a sum of money bet in this state on a presidential election. The court instructed the jury that if the note paid by plaintiff was given to secure a bet on the presidential election, and the plaintiff, at the time he signed the note, knew it was given for that purpose, the plaintiff cannot recover. There was a verdict for the defendant.

In our opinion, the fact that the surety (Harley) was compelled by the judgment of a court in the Mexican dominions to pay the debt does not affect the merits of this controversy. The instruction given by the court assumed, and the court have so found, that the plaintiff knowingly entered into an illegal contract. Whether he paid the money voluntarily, or was compelled thereto by process of law, it is equally against the policy of the law that he should recover in this action. We may presume that but for the plaintiff the contract would never have been made, nor the law violated. This is an attempt to obtain an indemnity for knowingly entering into an illegal contract. It is a rule that, whenever the party seeking to recover appears to have been in any respect contaminated with, or even privy to, the illegal transaction on which the claim is originally bottomed, his remedy, whether upon the primary consideration, or a security substituted for it, is gone. Paley on Agency, 120.. If a surety to a note, securing a sum bet on an illegal wager, can recover against his principal by paying the sum secured, then the policy of the law which forbids the recovery of money lost at unlawful gaming would be defeated.

Judge RYLAND concurring, the judgment will be affirmed. Judge LEONARD not sitting.

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ODLIN v. GREENLEAF.

(Superior Court of Judicature of New Hamsphire, 1825. 3 N. H. 270.)

Indebitatus assumpsit for money paid, laid out, and expended. The defendant pleaded the general issue and the statute of limitations.

The cause was tried here at January term, 1825, when it appeared that in the year 1813 the defendant, as principal, and W. A. Kent and Thomas Wilson, the plaintiff's testator, as sureties, made and delivered to the Concord Bank a promissory note for $750, payable to the bank in sixty days. In 1816 W. A. Kent, one of the sureties, paid to the bank the amount of the note; but this was done without suit, and without consulting the defendant. Wilson died in 1818, and the plaintiff, as executor of Wilson, in 1820, voluntarily paid to Kent one-half the sum the latter had paid to discharge the note. This payment was made without the knowledge of the defendant.

A verdict was taken for the plaintiff, subject to the opinion of the court upon the foregoing case.

The defendant contended that, ten years having elapsed since he had known or heard anything of the transaction, he had a right to rely upon the statute of limitations—first, upon its letter; and, secondly, upon its spirit—because he was deprived by the lapse of time of the means of proving that he had paid the note; his evidence in writing being lost and his witnesses dead.

He further contended, that a surety had no right, particularly after six years, to make a voluntary payment, without consulting his principal, so as to create a new cause of action against the principal, when the original cause of action was barred by the statute of limitations.

BY THE COURT. The defense upon which this defendant relies is founded upon a very great misapprehension in relation to the principles of law by which the cause must be settled.

Whether a surety, who voluntarily pays the debt after all remedy to recover it is barred by the statute of limitations, can maintain an action against the principal to recover the money thus paid, or against his co-surety for a contribution, is a question which does not arise in this case, and need not be examined.

It is settled that, as soon as the debt becomes due by the terms of the contract, a surety may pay it and at once have his remedy against his principal. 13 Johns. (N. Y.) 58, Mauri v. Heffernan; 4 Johns. (N. Y.) 461, Sluby v. Champlin; 16 Mass. 41, Skillin v. Merrill; 17 Mass. 464, Bachelder v. Fiske.

And it seems that a surety, who thus pays, may have his remedy against his co-surety, without showing any inability in the principal to pay. 2 B. & P. 268, 270, Cowell v. Edwards; 2 Esp. N. P. C. 478, Turner v. Davis.

In this case, when W. A. Kent, in 1816, paid the debt, he at once became entitled to an action against Wilson, to compel him to con-

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tribute, and might have maintained an action for that purpose at any time within six years after the payment. But it was not necessary that Wilson, or his executor, should be compelled by suit to pay, in order to render the defendant liable to them.

When, therefore, the plaintiff, as executor, in 1820, paid to Kent one-half of the sum, which the latter paid, the right of action in this case accrued; and there is no pretense that it is barred by the statute of limitations. An action is barred, not by a lapse of ten years, during which a negligent and ungrateful debtor, leaving all to the care of his sureties, has heard nothing and known nothing of the debt, but by a lapse of six years after the right of action accrues.

Judgment on the verdict.

TARLETON v. TARLETON.

(Court of King's Bench, 1815. 4 M. & S. 20.)

Covenant upon an indenture, of the 13th of September, 1800, made between the plaintiff, of the one part, and the defendant and one D. Backouse, since deceased, of the other part, whereby the defendant and the said D. B. jointly and severally covenanted with the plaintiff to pay and satisfy, or cause to be paid and satisfied, within two years from the 23d of July then last, all such debts as were remaining due from the late partnership of the plaintiff, defendant, and D. B., and to indemnify the plaintiff from all debts due from the said partnership, and from all actions, suits, costs, charges, damages, and expenses by reason of the non-payment thereof, and from all claims and demands whatsoever which might be made on him on account of the partnership, and from all costs, charges, and expenses which might be incurred in consequence of such claim or demand, etc. Breach: That the defendant and D. B. did not, within two years, etc., pay all such debts, etc., nor indemnify the plaintiff, etc.; 2dly, that upwards of two years from the 23d of July in the indenture mentioned, to wit, on the 21st of July, 1810, a certain valid and sufficient claim and demand to the amount of £6,000. remained due from the partnership, and thereupon one F. B. and C. B. and J. U. B., being entitled to receive and enforce payment, filed their bill for the recovery thereof in the Court of Chancery of the island of Grenada against the plaintiff, one W. P., the defendant, and D. B., which suit was abated by the death of D. B. and C. B., but was afterwards, by bill of revivor, revived against the plaintiff, W. P., and the defendant, and such proceedings were had that afterwards it was decreed that £5,978. 2s. 7d. currency of Grenada should be paid by the defendants in that suit to the plaintiffs in that suit, with full costs, as by the said decree, etc. And thereupon afterwards a writ of sequestration was issued against the plaintiff's real and personal estate, under which his lands, build-

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ings, slaves, etc., were sequestered until the plaintiff afterwards was forced and obliged to pay the said debt and costs, etc. Pleas (amongst others): Non damnificatus; 2dly, that no such claim or demand as alleged in the 2d breach remained due, etc.; 3dly, that F. B., C. B., and J. U. B. had not any such claim or demand of which they were entitled to receive and enforce payment, etc. Issue taken on these pleas.

At the trial, before Lord Ellenborough, C. J., at the London sittings after last term, the plaintiff proved the indenture, and also an examined copy of the proceedings in the court of Grenada, by which it appeared that the decree passed against the defendant and W. P. in the original suit pro confesso for want of an answer. The defendant, in maintenance of his pleas, proposed to show that the proceedings in the court of Grenada were erroneous, inasmuch as the account was incorrectly taken. His Lordship, however, ruled that the defendant could not go into that question, inasmuch as, the foreign court being a court of competent jurisdiction, what was done in it must, for the purpose of this action, be taken to be rightly done; and the plaintiff had a verdict.

Casberd moved for a new trial, upon the ground that the proceedings in the foreign court were not conclusive evidence. He said that, where a foreign judgment is the subject-matter of a suit in this court, it was but prima facie evidence, and the defendant might impeach the justice of it. See Walker v. Whitter, Dougl. 1., and notes to that case.

Lord ELLENBOROUGH, C. J. I thought that I did not sit at nisi prius to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defense. The plaintiff, by this neglect, has been obliged to pay the money in order to avoid a sequestration.

BAYLEY, J. How is this plaintiff to be called upon to unravel these proceedings? As between the parties to the suit the justice of it might be again litigated, but as against a stranger it cannot. The defendant was a party to the suit, and has concurred, by his not appearing to it, in suffering the plaintiff to be damnified.

PER CURIAM. Rule refused.

CAHILL v. BIGELOW and Trustee.

(Supreme Judicial Court of Massachusetts, 1836. 18 Pick. 369.)

The answer of Windsor Hatch, the alleged trustee, set forth that the principal defendant had kept a boarding house for the workmen employed in the respondent's manufactory, and that he became debtor for their board; that at the time when the defendant began to keep the boarding house it was agreed verbally between the respondent, the defendant, and several persons named, who subsequently furnished her

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with provisions and other supplies, that the supplies should be delivered and charged to her, and that, at the end of each quarter, the respondent would see that the persons who furnished them were paid; that the supplies were accordingly charged to the defendant, and the respondent paid all such charges up to January 1, 1835; that at the time of the service of the writ the amount due on account of supplies furnished upon the strength of the respondent's guaranty exceeded the amount due to the defendant for board; that the balance had never been less since that time, as she very soon afterwards left the boarding house, and had not paid any part of the bills; that if the respondent was legally liable for those charges which remained unpaid, in consequence of such verbal arrangement, then he had no goods, effects or credits of the defendant in his hands and possession at the time of the service of the writ; that otherwise there was a balance due to her at that time; that the respondent had always been in the habit of making such arrangements respecting the boarding of his workmen; and that he considered himself bound to pay such charges, as those who furnished supplies for the boarding house would not have done it, if it had not been for his engagement to see them paid.[16]

SHAW, C. J., delivered the opinion of the court.

The only question is whether the trustee is chargeable on his answer, as having goods, effects or credits of Mrs. Bigelow, the principal defendant, at the time of the service of the writ. On the facts disclosed in the answer, the attaching creditor contends that the trustee is chargeable, on the ground that he was indebted to the principal for the board of his workmen, and that his undertaking to pay those who supplied her was void by the statute of frauds, because it was the promise to pay the debt of another, without any note or memorandum in writing. On the contrary, the trustee insists that he is entitled to be discharged, first, because his undertaking to pay those who furnished supplies to Mrs. Bigelow was original, and not collateral, and so not within the statute of frauds; and, secondly, because, if otherwise, the trustee is not bound to set up the statute of frauds to avoid his engagements, his contract was voidable and not void, and, if he does not elect to avoid it, he is not bound to do so, to aid an attaching creditor.

On the first point the court are all of opinion that the undertaking of Hatch, the trustee, to pay for supplies furnished to Mrs. Bigelow, was collateral and conditional, to pay if she did not, to pay her debt, and so was within the statute of frauds.[17] * * *

Upon the other point, the court are of opinion that the guarantor by parol was not bound, against his own choice, to set up the statute of frauds, to avoid his promise to pay for the supplies furnished to

[16] The arguments of counsel have been omitted.

[17] The further discussion of the question whether the trustee's promise was within the statute has been omitted.

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Mrs. Bigelow. The contract entered into by him with these persons was a lawful one, made on sufficient consideration, and would be good at common law. But the statute, on considerations of policy, intervenes and declares that such a contract shall not be enforced by action, unless the agreement or some memorandum thereof shall be in writing. St. 1788, c. 16, § 1.

But the statute is intended as a shield, and is to be used for the protection of those who would be in danger of suffering injury from false testimony by setting up pretended parol promises of guaranty. The statute does not declare the contract void, but merely provides that no action shall be brought whereby to charge, etc., unless the contract, or some memorandum thereof, be in writing. The effect of the statute is that the promisor, who would otherwise be liable to such an action, may avoid it.

The guaranty having been given by the request of the debtor, and for her benefit, whatever should be paid upon it by the guarantor must be deemed to be paid at her request, and for her account, and would be chargeable to her, and must go to discharge the debt due from him to her. The trustee in effect declares his election, not to avail himself of the statute of frauds to avoid his parol undertaking to pay these debts, but to pay them according to the original understanding between him and the other parties; and the court are of opinion that he has a right to do so and to charge the payments in his account with Mrs. Bigelow, in which case there is nothing remaining in his hands due to her liable to the attachment. See Alexander v. Vane, 1 Mees. & Welsby, 511.

Trustee discharged.[18]

MARSHALL v. HUDSON.

(Supreme Court of Tennessee, 1836. 9 Yerg. 57.)

Lewis Earthman, James Marshall and Zenas Tate, on the 19th day of November, 1819, made and executed their certain note or writing obligatory, sealed with their seals, to the Nashville Bank, for the sum of $284.62½, due three years after date, bearing interest from the date. Lewis Earthman was the principal debtor in said note, and James Marshall, the plaintiff in this motion, and Zenas Tate were securities to said note. Lewis Earthman died in 1828, and administration upon his estate was, in July, 1828, granted to his widow, Judith Earthman, now Judith Hudson, the defendant, and John S. Cox, who at the July term, 1828, of the court of pleas and quarter sessions of Davidson county court, duly qualified according to law. The administrator and administratrix gave due notice of their appointment according to law. No claim, demand, or suit was exhibited or brought against the administrator and administratrix within two years after their qualification, nor was any request made to the Nashville Bank

[18] Accord: Beal v. Brown, 13 Allen, 114 (1866).

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by the administrators to delay the bringing of suit on said note. The Nashville Bank instituted suit against said Judith, who pleaded the act of 1789, c. 23, limiting actions against executors and administrators, upon which plea judgment was rendered in her favor; whereupon the Nashville Bank instituted suit against said Marshall alone, upon said note, in the county court of Davidson county, in which suit Marshall relied upon the statute of limitations of two years in favor of the estate of deceased persons (Act of 1789, c. 23), and the judgment in favor of defendant as discharging the estate of Lewis Earthman the principal, and that as security he was discharged. The county court decided that said Marshall was discharged, and upon appeal to the Supreme Court the judgment of the county court was reversed and judgment rendered against said Marshall for the full amount of said note and interest, amounting to $95.14½, and interest thereon, and also the costs of suit.

Tate was dead, and no suit was brought against his representatives within two years after his death. The Nashville Bank was incorporated by the Legislature of Tennessee, and Lewis Earthman, James Marshall and Zenas Tate were citizens of Tennessee, and defendant is a citizen of Tennessee, and surviving administratrix of said Lewis Earthman deceased. Said defendant now relies upon the act of 1789, c. 23, as a bar to plaintiff's right of recovery, believing that no cause of action exists against her, and insists that the payment of the money by, or a recovery of the judgment against, plaintiff, raises no obligation or liability on behalf of the plaintiff against the defendant. The parties agreed, if, upon these facts, the law is in favor of the plaintiff, judgment is to be rendered for the sum of $95.14½, and interest, the amount of the judgment of the Nashville Bank against plaintiff, and the costs of that suit, and interest from the rendition of the judgment; if in favor of the defendant, judgment is to be rendered for defendant for costs.[19]

REESE, J., delivered the opinion of the court.

The Nashville Bank, at the last term of this court, recovered a judgment against the plaintiff, who was indebted to it as the security of the defendant's intestate, although the plaintiff then urged that he was not liable, because the administratrix had by the judgment of the court been previously exonerated on the ground of the operation of the statute of limitations against executors and administrators. The question in the case is whether, having since paid the money to the bank, he can now recover it from the defendant? And the court is of opinion that he can. To maintain the correctness of this opinion, it is proper to inquire first, into the origin of the plaintiff's cause of action, for the purpose of ascertaining whether at the time defendant became administratrix he was a creditor within the meaning of the act referred to, and, secondly, into the effect upon his rights, pro-

[19] The arguments of counsel are omitted.

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duced by the fact that lapse of time had barred the claim of the bank against his principal.

As to the first point, it has been settled that the cause of action, although growing out of a relation of principal and surety created by the original contract, commences in point of time with, and is founded upon, the payment of the debt by the surety, or, at the earliest, by a statute of our own, upon the rendition of a judgment against him. It is then he becomes a creditor of his principal. It is true that previously to this, and arising from the relation between them, he is not without some protective and preventive remedies against his principal. He may file a bill against his principal and the creditor. He may give the creditor notice to bring suit. But it seems to us that these remedies are not founded upon, nor does their existence create, the relation of creditor and debtor, within the meaning of the act of 1789, c. 23.

Secondly, what effect is produced by the fact that time had barred the claim of the bank against the defendant? It is urged that the operation of the statute for the limitation of actions against executors and administrators differs from the general statute of limitations, in this: That the latter takes away the remedy only, while the former entirely extinguishes the debt.[20] * * *

We are therefore of opinion that the plaintiff take his motion.

Judgment for plaintiff.

HATCHETT v. PEGRAM.

(Supreme Court of Louisiana, 1869. 21 La. Ann. 722.)

Appeal from Second District Court, Parish of Orleans; Thomas, J.

WYLY, J. Plaintiff paid the note of N. J. Pegram, on which he was security, and now sues the succession of the latter to recover the amount he alleges he was compelled to pay on account thereof, basing his demand on the following note and receipt, viz.:

"$1,136.26. New Orleans, January 9, 1854.

"Two years after date we, or either of us, promise to pay to the order of Crisp, McGee & Co., eleven hundred and thirty-six dollars and twenty-six cents, with interest at six per cent. per annum.

"[Signed] N. J. Pegram.

"[Signed] William T. Hatchett,
"Security."

Indorsed:

"Received, Montgomery, Alabama, January 4, 1867, from William T. Hatchett, the security of this note, the sum of sixteen hundred dollars, in full payment of same.

"[Signed] R. B. McGee,
"By his attorneys, Cook, Enoch & Allen."

[20] That portion of the opinion reaching the conclusion that the statute of limitations in favor of executors, etc., did not extinguish the debt, has been omitted.

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The defense is a general denial, and averments that the note was a Louisiana contract, entered into by parties residing in this state, and that the obligation was extinguished by prescription at the time the security, Hatchett, professes to have paid it; the note being then eleven years past due. The defendant also alleges that if the plaintiff paid the note in Alabama on 4th January, 1867, as alleged, it was a mere voluntary act on his part, which imposed no obligation on the succession of N. J. Pegram; that the latter was residing in this city at the time he made the note, and continued so to reside until his death, which occurred long after the note had been prescribed by the laws of this state.

The court rendered judgment in favor of the defendant, and the plaintiff has appealed.

There can be no doubt that the note, as regards the succession of Pegram, was extinguished by prescription under the laws of this state where the succession was opened. Civ. Code, art. 3505.

But was the obligation extinguished as regards the security, William T. Hatchett, on the 4th January, 1867, when he paid it in the state of Alabama, where he then resided? Was he bound by the laws of that state to pay it? If so, can he recover the amount so paid from the estate of the principal debtor?

These are the main questions to be determined in this case. As to the liability of the security, Hatchett, in the state of Alabama, where he resided at the time, the laws of that state must govern; the only defense to the note being the plea of prescription.

Was the note prescribed under the laws as administered in the state of Alabama?

We find in the record the opinions of Judge Walker and other eminent jurists of that state, which were received as evidence without objection. In determining the liability of the plaintiff, great weight should be given to these opinions. They were received as testimony in this case.

Judge Walker testifies that he had no means of judging of Hatchett's liability, except from what appeared upon the note itself, and in his opinion he was liable thereon at the time he paid it; that six years was the period prescribed in the statute of limitations, "but on the 21st September, 1865, the convention of the state of Alabama adopted an ordinance directing that, in computing the time necessary to create the bar of the statute of limitations, the time elapsing between the 11th day of January, 1861, and the passage of this ordinance (21st September, 1865), should not be estimated. This ordinance is law in the state of Alabama. After deducting the interval prescribed in the ordinance from the period intervening between the time when the note became due and the 4th January, 1867, there will not remain six years. "It is therefore my opinion," says he, "that under the laws of the state of Alabama the defense of the statute of limitations would not have been available to Hatchett in a suit commenced against him on 4th Jan-

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uary, 1867. In attaining this conclusion I have considered the question springing from the fact that a suit on the note was barred in 1862, before the adoption of the ordinance, unless the operations of the statute were interfered with by Hatchett's absence from the state, of which I am not informed. The question thus arising," says he, "is this: Whether it was competent for the convention of the state of Alabama to change the period of limitation to an action on a contract after the time necessary to perfect a bar under the pre-existing law. In my opinion on the law as recognized and administered in this state, it was competent."

He further states that this view has been sustained by the Supreme Court of Alabama recently in a case presenting an analogous question, and that the principle has been settled by decisions extending as far back as 1850. When asked by the defendant in his second cross-interrogatory what would be the effect of the accessory obligation of surety if from any cause the principal obligor had been discharged, the witness said: "In 1837 it was decided by the Supreme Court of Alabama that as a general rule the extinction of the liability of a principal debtor was also an extinction of the liability of the surety, but that an exception prevailed when the extinction was caused by operation of law," etc. He referred to various subsequent decisions to the same effect, and said, in his opinion, the law as thus laid down in 1837 was the law of Alabama on 4th January, 1867.

The other distinguished jurists, who were examined in this case, entertained the same view of the subject as Judge Walker, and they adopted his opinion as a true exposition of Alabama law.

It appears, however, that the opinions of these witnesses were based upon what appeared on the face of the note, without reference to the effect of Hatchett's absence from the state of Alabama, of which they say they were not informed. If Hatchett only moved from this state to Alabama after prescription had accrued upon the contract which he made here, does the ordinary statute of limitations of that state apply?

It appears by the Code of Alabama (article 2487) that "when the statute of limitations of another state or foreign country has created a bar to an action upon a contract or act done in such state or country, whilst the party sought to be charged thereby was a resident of such state or country, the bar thus created is effectual in this state against any suit brought therein, in the same manner it would have been in the state or country where the act was done or contract made."

This seems to be the law of the state of Alabama, specially applicable to persons of that state who are sought to be held liable on contracts made in other states and barred by the statutes thereof before moving therefrom. Assuming, then, that the ordinance of the Alabama Convention of 1865 was valid, and that, in computing the time necessary to create the bar of the statute of limitations, no estimation is to be made of the time elapsing between the 11th January, 1861, and

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21st September, 1865, how does that affect the article of the Code of Alabama just quoted in reference to contracts made in another state and prescribed by the laws thereof before the party sought to be held liable moved from that state to Alabama?

Did the ordinance necessarily repeal the article of the Code? We think not. That article designated a certain class of cases where the prescription law of other states should be permitted to apply. We understand the action of the convention, if valid, to modify the statute of limitation in Alabama, so that in making the estimate the period of the war was not to be computed.

The ordinance does not expressly repeal the article referred to, nor is it inconsistent therewith. It does not pretend to interfere with the law which permits the prescription laws of other states to be applied in certain cases.

The contract was entered into in this state, where the maker of the note and the payee thereof resided, and where we presume the security, Hatchett, also resided. In the absence of proof to the contrary, we will presume that the surety on a Louisiana contract was an inhabitant of the state. If Hatchett moved to Alabama after the note had prescribed here, under the article of the Alabama Code referred to, we think he was not bound to pay it; and that the payment of an obligation, already extinguished as to both principal and surety, by the latter, does not give him a cause of action against the former. Civ. Code, art. 3025.

As Hatchett paid the note without being sued, he cannot recover against the defendant without proving that he was bound to do so. The note was as its face prescribed, and the onus is on him to show that he was liable at the time he paid it.

It is proved that the plaintiff lived in Alabama when he paid the note (January 4, 1867), and that he resided there several years previously. According to our laws the note had been prescribed nearly six years when he paid it. He may have lived there several years prior to the payment, and yet the note may have been prescribed before he moved from this state. Moreover, it does not appear from the record that the note had been indorsed by the payees, Crisp, McGee & Co., or that they authorized R. B. McGee to collect it. On the whole, we think plaintiff has failed to make out his case. He has not established with legal certainty that he was bound by the laws of Alabama to pay the note.

It is therefore ordered that the judgment appealed from be set aside, and it is now ordered that there be judgment as of non-suit, and that appellee pay costs of appeal.

Rehearing refused.

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NORTON v. HALL.

(Supreme Court of Vermont, 1868. 41 Vt. 471.)

General assumpsit. The defendant pleaded the general issue and statute of limitations. The plaintiff replied to the special plea that the cause of action did accrue within six years. The writ is dated September 29, 1866, and was served October 21, 1866. Trial by the court, August term, Caledonia county, 1868; Steele, J., presiding.

The plaintiff introduced in evidence a note, of which the following is a copy: "Concord, July 2, 1855.

"For value received, I promise to pay Ira Foster, or his order, one thousand dollars, the first day of December next, at the Mechanics' Bank, $1,000. [Signed] Dudley P. Hall.

"Indorsed: Demand and notice waived. Ira Foster.
"Demand and notice waived. C. H. Norton.
"Demand and notice waived. Albert Foster."

The Mechanics' Bank referred to is in Concord, N. H., where the three indorsers lived when the note was given, and have ever since. The defendant lived in Vermont when the note was given, and has ever since. The plaintiff, the second indorser, paid to said bank, December 19, 1861, the balance then due on the note, which was $980.21, and it is to recover this sum, and the interest upon it since it was paid, that this suit was brought.

When this note was given, Ira Foster and Dudley P. Hall were interested together in an unsettled partnership. Foster was accustomed to send notes to Hall, and he would sign and indorse them, and the funds would be obtained at some bank, and be used in the company business, or in private business of either one, as might be agreed, and it was understood between the parties that the matter of these funds was to be left to be settled in the final adjustment of the partnership. The partnership business resulted in a failure, and is still unsettled. The note in question was written at Concord and sent to Vermont, to Hall, who signed and returned it to Ira Foster, who procured the plaintiff and Albert Foster, without compensation and as an accommodation, to indorse it and draw the funds at the bank. When the note became due, Ira Foster sent a new note for the same amount to Hall, which he signed and returned to take up the note in question. The following is a copy of the new note:

"$1,000. Burke, December 1, 1855.

"Four months from date, for value received, I promise to pay to the order of Ira Foster one thousand dollars, at the Mechanics' Bank, Concord, N. H.

"[Signed] Dudley P. Hall."

By the time the new note was given Hall had become satisfied that Ira Foster was owing him on the partnership account and that the

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note in question had been so used that it was the equitable duty of Ira Foster to pay it. He therefore declined to sign a new note, unless Ira Foster would give him a note of the same amount. Ira Foster complied with this demand, but still claimed that Hall was owing him on the partnership account. How the fact was the court did not think it material or possible to find in this case. The new note was indorsed by the same parties and left at the bank; but, the bank refusing to give up the first note for the second, the last two indorsements were erased, and the note never discounted. On the 1st of December, 1855, the plaintiff was unable to meet the note that then became due, and the bank demanded of him additional security, and accordingly the plaintiff assigned to them as collateral certain notes for $1,800 on five years, secured by mortgage. Ira Foster was not solvent at that time, and his means have remained more or less in supposition ever since. The plaintiff's securities were held by the bank as collateral until December 19, 1861, when the plaintiff took them up with the note on paying the $980.21 for which this suit is brought. The plaintiff had remained liable to the bank up to the time he paid the note. The bank had regarded him responsible, and never allowed matters to get into such a situation that he could plead the statute of limitations.

The plaintiff never had any conversation or communication with the defendant about the note until long after he paid it; and the defendant never knew anything about the note after he signed the new note of December 1, 1855, but supposed it was taken up by the new note. He never made any acknowledgment or promise, either oral or written, to pay the note after it was given, other than by the giving of the note of December 1, 1855, to take up the old note.

Since December 1, 1855, the defendant has had no known property in New Hampshire, and has never resided there, but has occasionally been in Lancaster, Littleton, Claremont and Charlestown, in New Hampshire, on business, but in no one of these places more than a day at a time. He has also been at Concord, N. H., once in 1855, once in 1856, and two or three times since, but never to stop more than one night. He was never in the Mechanics' Bank, and the officers of the bank and the plaintiff had no actual knowledge of the defendant being in the state of New Hampshire on any of these occasions, but the defendant made no effort to keep out of their sight. The law of New Hampshire on the subject of the statute of limitations, so far as it may be material in this case, was proved; but, as this appears in the statutes and reports of that state, the court, by the consent of the parties, did not state any finding upon questions of New Hampshire law, but left such questions, so far as they may be material, to be decided by the Supreme Court.

Upon these facts the court rendered judgment for the defendant to recover his costs. If judgment is reversed, final judgment is to be

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rendered then for the plaintiff for $980.21, and interest since December 19, 1861. Exceptions by the plaintiff.[21]

The opinion of the court was delivered by

WILSON, J. This is an action of assumpsit, by which the plaintiff seeks to recover for money paid by him to the Mechanics' Bank, Concord, N. H., on the defendant's note, on which the plaintiff says he was liable as surety for the defendant. The defendant pleaded the general issue and the statute of limitations. The plaintiff replied to the plea of the statute of limitations, that the cause of action did accrue within six years.

I. The defendant claims that the liability of the plaintiff on the note was not that of surety, but that he was liable as an original promisor or guarantor of the note, and that he incurred that liability not by the request of the defendant. This proposition of the defendant is not warranted by the facts in the case. It appears that, when this note was given, Ira Foster, the payee, and the defendant, Dudley B. Hall, were interested together in an unsettled partnership. Foster was accustomed to send notes to Hall, and he would sign or indorse them, and the funds would be obtained at some bank, and be used in the company business, or in the private business of either one, as might be agreed, and it was understood between them that the matter of these funds was to be left to be settled in the final adjustment of the partnership. The case states that the note in question was written at Concord, and sent to Vermont, to Hall, who signed and returned it to Ira Foster, who procured the plaintiff and Albert Foster, without compensation and as an accommodation, to indorse it, and the bank purchased and became the owner of the note. The finding of the court below leaves no doubt that the note was given for the accommodation and benefit of the defendant, as well as for Ira Foster, and that the liability incurred by the defendant to the plaintiff, by reason of the plaintiff's liability to the bank on the note, is precisely the same as it would be if the note had been executed and indorsed in the presence and at the request of both Ira Foster and the defendant, at the time it was given. Upon the facts of this case, it is quite clear that the liability of the plaintiff to the bank was that of surety for the defendant.

It is insisted by the defendant's counsel that a recovery on the note against him, at the time the plaintiff made the payment, was barred by the statute of limitations, because it was more than six years from the time the note became due to the time of such payment by the plaintiff; the defendant not having made any acknowledgment or promise within that time to pay the note. The note became due December 1, 1855, the defendant neglected to pay it, the plaintiff was unable to meet the note, and the bank demanded of him additional security; and accordingly the plaintiff assigned to them as collateral certain notes

[21] The arguments of counsel are omitted.

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for $1,800, on five years, secured by mortgage, and those securities were held by the bank as collateral until December 19, 1861, when the plaintiff took them up, with the note, on paying the $980.21 for which this suit is brought. The county court found that the plaintiff had remained liable to the bank up to the time he paid the note, and that the bank regarded him responsible, and never allowed matters to get into such a situation that he could plead the statute of limitations. The plaintiff's right of action at law, as surety for the defendant, accrued on payment of the note to the bank, which was within six years next before the commencement of this suit. Bishop v. Day et al., 13 Vt. 81, 37 Am. Dec. 582; Ex'r of Baker v. Marshall et al., 16 Vt. 522, 42 Am. Dec. 528.

It is further insisted by the defendant that the note, having been kept on foot, by an arrangement between him and the bank, for more than six years after it fell due, was not a subsisting debt against the defendant at the time the payment was made by the plaintiff; and therefore the defendant claims it should be treated as a voluntary payment by the plaintiff, for which he ought not to recover of the defendant. But this position of the defendant is not sustained by the authorities cited by him. The case does not show that the delay of the plaintiff to pay the note was in fraud of the rights of the defendant, or that he was thereby in any manner prejudiced. It is not a case where the surety revived his own liability after it was barred by the statute of limitations. The defendant as principal and the plaintiff as surety were, on the 1st day of December, 1855, when the note became due, liable to pay it. The defendant should have paid the note and saved the plaintiff harmless. It was the duty of the defendant, at all times so long as the plaintiff remained surety by force of the liability incurred by signing or indorsing the note, to indemnify the plaintiff by paying the note. The neglect of the defendant to pay the note when it became due compelled the plaintiff to give the bank additional security and to request further time of payment. All this was done while both plaintiff and defendant were liable to pay the note. The arrangement made between the bank and the plaintiff, as surety for the defendant, was one that could be properly made, and it is consistent with the original obligations and rights of the parties and with the relation of the plaintiff as surety for the defendant.

The law will treat the arrangement so made by the plaintiff with the bank, in respect to said note and its payment, as having received the sanction of the defendant. The defendant, by his neglect to pay the note, left the matter of its payment to be arranged and made by the plaintiff; but the arrangement made between the plaintiff and the bank did not prevent the defendant from making payment to the bank at any time. It is clear, we think, that where the liability of the surety has, in good faith, continued more than six years from the time the note became due, and payment of the note is made by him, such continued liability of the surety carries with it the relation of principal and

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surety, and the liability of the principal to reimburse the surety for the money so paid by him. The defendant's liability to his surety, the plaintiff, was not barred by the statute of limitations at the time the plaintiff paid the note; but, as between these parties, the statute began to run on the plaintiff's claim when he paid the note, December 19, 1861.

The judgment of the county court is reversed, and judgment for the plaintiff to recover the sum of $980.21 and interest since December 19, 1861, and his costs.

SMITH v. WHEELER.

(Supreme Court, Appellate Division, Third Department. New York, 1900. 55 App. Div. 170, 66 N. Y. Supp. 780.)

Appeal by the plaintiff, Orrin W. Smith, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Delaware on the 31st day of January, 1900, upon the decision of the court, rendered after a trial before the court without a jury at the Delaware Trial Term, dismissing the complainant upon the merits.

On the 19th of November, 1896, the defendant executed and delivered to the plaintiff his promissory note, dated that day, for $550.19, payable to the order of plaintiff four months from the date thereof at the Delaware National Bank. The note was given for a debt on contract then due from defendant to plaintiff. It was duly indorsed and transferred by the plaintiff to the bank above named, was not paid at maturity, and was duly protested. The bank afterwards brought an action in the Supreme Court on the note against both parties, and on the 16th day of August, 1897, duly recovered a judgment against them for the sum of $586 damages and costs. An execution was issued thereon, and on the 31st of October, 1898, the plaintiff paid the amount thereof, being the sum of $650.39. That amount the plaintiff in this action seeks to recover of the defendant. On the 18th day of August, 1898, the defendant filed in the proper court his petition in bankruptcy, and was on that day adjudicated a bankrupt. In the schedule of liabilities attached to the petition there was a statement of the judgment recovered by the bank. On the 7th day of February, 1899, a discharge was duly granted to the defendant, pursuant to the act of Congress on that subject then in force. The defendant set up the discharge as a defense to this action. The court held the defense a good one and dismissed the complaint.

MERWIN, J. The question here is whether the discharge is a bar to the claim of the plaintiff.

A discharge in bankruptcy releases a bankrupt from all of his provable debts, with certain exceptions not important here. Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550. If the claim of the plaintiff

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was a provable debt within the meaning of the bankrupt act, then the discharge is a bar.

By subdivision i of section 57 of the act it is provided as follows: "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

In the bankrupt act of March 2, 1867 (14 Stat. 525, c. 176, § 19; Rev. St. U. S. § 5070), there was a similar provision, and, under it, it was held in Hunt v. Taylor, 108 Mass. 508, that the liability of the drawee, upon a bill of exchange accepted and dishonored by him, to an indorser, who then pays it, is barred by a discharge of the drawee in bankruptcy proceedings begun after his dishonor of the bill, though before the payment by the indorser. The action in that case was for money paid to the defendant's use.

In Mace v. Wells, 7 How. 272, 12 L. Ed. 698, a similar provision in the bankrupt act of 1841 was under consideration, and it was held that the bankrupt was discharged by his certificate from all liability to the surety for money subsequently paid on account of the debt.

These authorities are quite persuasive, if not controlling, on the question before us. No different rule was, I think, intended to be adopted by the act of 1898, although the wording of the provision differs in some respects from the prior acts. See Lowell on the Law of Bankruptcy, 132, 316, 465.

It must be held, I think, that the claim of the plaintiff was provable under the bankrupt act, and that, therefore, the discharge is a bar. All concurred.

Judgment affirmed, with costs.[22]

THAYER v. DANIELS.

(Supreme Judicial Court of Massachusetts, 1872. 110 Mass. 345.)

Contract. The declaration alleged that the defendant, as principal, and the plaintiff, as surety, signed a note for $500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety without consideration, and for the accommodation of the defendant; that the defendant failed

[22] Accord: Hayer v. Comstock, 115 Iowa, 187, 88 N. W. 351 (1901); Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677 (1887); Lipscomb v. Grace, 26 Ark. 231, 7 Am. Rep. 607 (1870); Hunt v. Taylor, 108 Mass. 508 (1871); Fairbanks v. Lambert, 137 Mass. 373 (1884); Hamilton v. Reynolds, 88 Ind. 191 (1882). But see Leighton v. Atkins, 35 Me. 118 (1853), where the surety on a joint note due before bankruptcy proceedings commenced paid a joint judgment recovered thereon after his principal's discharge, and it was held that the surety was entitled to reimbursement.

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to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allegations of the declaration, and also set up the statute of limitations, and a discharge of the defendant in insolvency.

At the trial in the superior court, before Bacon, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the third meeting of the creditors George proved the note against the defendant's estate; that a small dividend was then declared; that afterwards, in August, 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note $500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due, and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

AMES, J. There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by that statute cannot be maintained. Appleton v. Bascom, 3 Metc. 169; Hall v. Thayer, 12 Metc. 130.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying, the note, in whole or in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under Gen. St. c. 118, § 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of Mace v. Wells, 7 How. 272, 12 L. Ed. 698, which is relied upon by the defendant, arose under the bankrupt act of 1841, a statute which differed from our insolvent law, in allowing sureties and other parties under a contingent liability to prove such contingent

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liabilities as claims upon the estate, and, "when their debts and claims become absolute," to have them allowed.

The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Two other cases relied upon by the defendant, Wood v. Dodgson, 2 M. & S. 195, and Vansandau v. Corsbie, 8 Taunt. 550, were decided under English statutes which in express terms make the contingent liability of a surety a provable claim against the bankrupt's estate. In the first of these cases the court say that the statute was intended to benefit the sureties, by allowing them to share in the dividend before the estate is all gone, and before the actual payment of their liabilities. Neither of these decisions is applicable to a case under our insolvent laws.

Exceptions overruled.

SMITH v. SCHNEIDER et al.

(Supreme Court of Missouri, 1856. 23 Mo. 447.)

Appeal from St. Genevieve Circuit Court.

This cause was decided on a demurrer to the petition. The petition set forth substantially that at a public sale in partition on the 17th of May, 1853, one Simms became the purchaser of certain real estate; that, in compliance with the terms of the sale, he paid 10 per cent. of the purchase money and gave his bond to the sheriff for the residue, about $92, with Smith, the plaintiff, as his security, the bond being payable in 12 months; that, the bond not being paid on its maturity, judgment was obtained thereon, and, Simms being insolvent, the plaintiff, Smith, was compelled to pay said judgment, etc.; that since the purchase of Simms the defendant Schneider had become the purchaser at sheriff's sale of all Simms' right, title, and interest, and had received a deed from the sheriff; that Simms is insolvent. Plaintiff therefore prays judgment against Simms, who is a party to the suit, for the amount of his debt; also that the land in the hands of Schneider be subjected to the payment thereof. The sheriff was also made a party defendant to this suit.

The demurrer of defendants was overruled, and judgment given for the plaintiff. Defendant Schneider appealed.[28]

SCOTT, Judge, delivered the opinion of the court.

Schneider became the purchaser of Simms' equitable title at a sheriff's sale. He took that title with its incumbrances. As Simms could not have obtained a title to the land without paying the balance of the purchase money, Schneider, claiming under him, was in no better sit-

[28] The arguments of counsel are omitted.

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uation. He could only get the land by paying the sum he bid for it and the balance of the purchase money. That was the bargain he made when he became the purchaser at the sheriff's sale. Smith, being the security of Simms for the purchase money, when he paid it he had a right to be substituted to the equity of the owner of the land, which equity was to hold the title until the purchase money was paid.[24] Now, as Schneider bought the land subject to the payment of the unpaid purchase money, and as Smith, the surety of Simms, has paid the money, he is entitled to have the land sold in order that it may be refunded to him.

The doctrine in relation to the discharge of the lien for the payment of the purchase money is not applicable to this case, as the owners of the land had never parted with their title by the execution of a deed. The legal title was in them, and they had an equity to have the land sold for the purchase money, and Smith, the surety of Simms for that money, having paid for it, is entitled to be substituted in the place of the holders of the legal title, whoever they may be. The other judges concurring, the judgment will be affirmed.

[24] As to mortgagor's action for indemnity against his grantee, who has personally assumed the mortgage debt, see 15 H. L. R. 583; Id. 398.

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CHAPTER III

THE SURETY'S EQUITY OF SUBROGATION

PARSONS & COLE v. BRIDDOCK et al.

(High Court of Chancery, 1708. 2 Vern. 608.)

Plaintiffs in 1694 were bound as sureties for Mr. Briddock, and had counter-bonds. Briddock, the principal, was afterwards arrested, and the defendant, his brother, became his bail, and judgment was obtained against the bail. The plaintiffs, being sued on the original bond, were forced to pay the money, and now brought their bill to have the judgment obtained against the bail assigned unto them, in order to be reimbursed what they had paid.

Per LORD CHANCELLOR. The bail stand in the place of the principal, and cannot be relieved on other terms than on payment of principal, interest and costs, and the sureties in the original bond are not to be contributory; and therefore decreed the judgment against the bail to be assigned to the plaintiffs, in order to reimburse them what they had paid, with interest and costs.

And although the plaintiffs by their bill had unadvisedly charged that they had agreed to pay an equal proportion of the debt, yet the defendants having by answer denied they made any such agreement, that set the plaintiffs at large, and left them at liberty to demand the whole against the defendants; and decreed it accordingly.[1]

[1] "Still another important class of equitable obligations created by equity alone are those commonly known as rights of subrogation. For example, a debtor becomes personally bound to his creditor for the payment of the debt, and also pledges his property to the creditor for the same purpose. A third person also becomes personally bound to the creditor for the payment of the same debt as surety for the debtor, and pledges his property to the creditor for the same purpose. In this state of things justice clearly requires that the debt be thrown upon the debtor, or upon the pledge belonging to him, and that the surety and the pledge belonging to him be exonerated from the debt, provided this can be done without interfering with the rights of the creditor. The latter, however, has the right to enforce payment of his debt in whatever way he thinks easiest and best, i. e., in whatever way he chooses; and equity cannot prevent the exercise of that right without a violation of law. If, then, the surety or his property should be compelled to pay the debt, the legal consequences would be, first, that the debt would be gone, and the debtor's personal obligation to the creditor be extinguished, for the payment by the surety or by his property has the same legal effect as payment by the debtor or by his property; secondly, that, the personal obligation of the debtor being extinguished, the real obligation of his property would be extinguished also, for the latter is only accessory to the former, and hence it cannot exist without it. Moreover, other legal consequences to the surety would be, first that the surety would lose the benefit of any legal priority that the creditor might have had over other creditors of the same debtor; secondly, that the surety would have no means of obtaining indemnity from the debtor unless

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BRANDON v. BRANDON.

(High Court of Chancery, 1859. 3 De Gex & J. 524.)

Lord Justice TURNER.[2] The sole question we have to decide is whether the shares in the testator's property which were purchased by W. Barnard John Brandon, the receiver in the cause, are liable to make good to his sureties the sums which they as such sureties have been obliged to pay in consequence of his default in not paying the balance due from him. These shares have been declared liable to make good to the parties to the cause those parts of that balance for which the sureties are not liable, and from this declaration there is no appeal. We must, therefore, consider that the shares in question are liable to the parties to the suit. The sureties have paid to these parties part of the moneys due to them, and in the absence of special circumstances must be entitled to stand in their place; prima facie, therefore, the sureties have a right against the shares in question.

It is urged by the appellants that the sureties accepted a security on the shares which descended to W. Barnard John Brandon, exclusive of the shares which he had purchased, and that it is to be inferred from this that they intended to abandon all claim against the purchased shares. But it must be observed that the sureties had not then paid anything; and to hold the indemnity deed to operate as a release of all the rights which by operation of law the sureties on payment would have against the other shares would be going too far, there being no words of release in the deed. The parties may have thought that there would not be any necessity to resort to the purchased shares, and may have intended, therefore, to leave them subject to such liability only as attached to them by law. I do not think that the mere omission of them from the specific security takes away the general right of the sureties against them.

Lord Justice KNIGHT BRUCE concurred.

he could prove a contract by the latter (either express or implied in fact) to indemnify him. But here equity employs a useful fiction in aid of the surety; for it treats the latter as having (not paid, but) purchased the debt. Hence it treats the debt as still subsisting in equity until it is paid by the debtor or by his property. In other words, payment by the surety or by his property does not extinguish any of the rights of the creditor in equity, though it does at law; and yet, after payment by the surety or by his property, the creditor holds his rights, not for his own benefit, but for the benefit of the surety. This, therefore, is an instance in which equity creates one equitable right (namely, in the creditor), in order to make it the subject of another equitable right (namely, in favor of the surety)." C. C. Langdell, A Brief Survey of Equity Jurisdiction, 1 Harvard Law Review, pp. 68, 69.

On subrogation between co-sureties, see 16 H. L. R. 439.

On subrogation of surety to rights of his principal to obtain reimbursement from the latter's debtor, see note, 21 H. L. R. 545.

On "Subrogation in Behalf of a Surety's Surety," see note in 17 H. L. R. 276.

[2] The facts sufficiently appearing in the opinion, the statement of facts and the arguments of counsel have been omitted.

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MUSGRAVE v. DICKSON et al.

(Supreme Court of Pennsylvania, 1896. 172 Pa. 629, 33 Atl. 705, 51 Am. St. Rep. 765.)

Exceptions to commissioner's report.

From the record it appears that Samuel Musgrave obtained a rule on H. A. Dickson to show cause why the said Musgrave should not have subrogation of the judgment Dickson had obtained against Bailey & Boler in an action in replevin founded on a distraint for rent, because he, the said Musgrave, had paid the judgment obtained against Bailey & Boler, J. C. Dickson and himself, in the action on the bond that had been given as required by law when the replevin action was instituted. H. A. Dickson in his answer claimed that subrogation should not be allowed, for the reasons: First, that there was still due him $143.45 and $45 costs on account of the judgment of which subrogation was desired; second, that said Musgrave, by going on the bond, enabled Bailey & Boler to retain possession of a brickyard, thereby becoming further indebted to him for rent in the sum of $600, which had not been paid.

The case was referred to J. H. Miller, Esq., as commissioner, who, without taking into consideration the averments of the answer above stated, recommended a decree in favor of S. Musgrave to the amount of $872.70.

H. A. Dickson filed, among others, the following exception to the commissioner's report:

"The commissioner erred in not finding that on December 31, 1893, there remained unpaid on the judgment entered in this case $143.45 and $45 costs, no part of which has since been paid."

The court overruled exceptions to the commissioner's report, and entered a decree in accordance with his recommendation.

Error assigned, among others, was (1) in not finding that of the judgment of which subrogation is asked there remained unpaid $143.45 and $45 costs.[8]

Mr. Justice FELL. This proceeding is founded upon a petition by Samuel Musgrave, one of the sureties on a replevin bond, for subrogation to the rights of the plaintiff in the judgment. An answer was filed by the appellant, the plaintiff, in which he averred that the judgment had not been fully paid, and in which he stated other supposed equitable grounds in denial of the right claimed. A separate answer was filed by the defendants, in which they alleged that they had transferred their property and business to the co-surety, J. C. Dickson, to secure him and Samuel Musgrave from any loss they might sustain by reason of the bond, and that from the management of their business an amount had been realized by Dickson more than sufficient to cover the payment made by Musgrave. It was agreed by both sureties that

[8] The arguments of counsel are omitted.

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the amount due the defendants from the management of the business should be credited by Musgrave on account of the money which he had paid. The issues thus raised were referred to a commissioner. The terms of the reference do not appear from the record, but it is stated in the appellee's history of the case that the commissioner was "to take testimony and find the facts in issue by the petition and answers."

The commissioner, having taken and considered the testimony, reported that the defendants, after the allowance of all proper credits, were indebted to the petitioner in the sum of $872.70, and to this amount subrogation was ordered by the court. A large part of the testimony has not been brought up with the record. From an examination of what appears we see no reason to doubt the correctness of the conclusion reached either as to the obligation to account or as to the amount due. The issue raised by the answer of the plaintiff seems to have been wholly ignored. Whether any testimony was taken under this issue we are not informed. None appears with the record. Its omission would be ground for the affirmance of the order, if there was a finding and report by the commissioner. Neither has been made. In the whole proceedings as it is presented no reference is made to this issue from the time it is raised by petition and answer until it is finally disposed of by the order making absolute the rule to show cause why subrogation should not be allowed. Its importance may have been an afterthought, but the issue is one which cannot now be disregarded. It is distinctly raised, and is the subject of an exception to the report of the commissioner and of a specification of error.

Subrogation rests upon purely equitable grounds, and it will not be enforced against superior equities. Unless the surety pays the debt in full he is not entitled to subrogation, and until this is done the creditor will be left in full possession and control of the debt and the remedies for its enforcement. Dering v. Earl of Winchelsea, 1 Leading Cases in Equity, 120; Kyner v. Kyner, 6 Watts, 221; Bank v. Potius, 10 Watts, 148; Hoover v. Epler, 52 Pa. 522; Allegheny National Bank's Appeal, 19 Wkly. Notes Cas. (Pa.) 78. The settlement of the account between the sureties and the defendant fixed the amount of the liability of the latter and the extent of the right to indemnity; but it did not affect the right of subrogation, which will never be allowed to the prejudice and injury of the creditor.

The judgment is reversed, and the record is remitted to the court of common pleas, in order that there may be a finding upon the issue raised by the answer of the appellant.

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LEE et al. v. GRIFFIN et al.

(High Court of Errors and Appeals of Mississippi, 1856. 31 Miss. 632.)

Appeal from the District Chancery Court at Yazoo City; Hon. George W. Dogherty, Vice-Chancellor.[4]

FISHER, J., delivered the opinion of the court.

This is an appeal from a decree of the Vice-Chancery Court at Yazoo City, sustaining a demurrer to the complainant's original and amended bill of complaint.

The facts are as follows: John and Thompson Brister, as executors of the last will and testament of one T. Brister, deceased, sold certain property of the testator under an order of the probate court of Yazoo county, at public sale, on a credit of eight months, when one James Perry became the purchaser. Perry executed his note, with the complainants as securities. He afterwards sold the property, which consisted of mules, wagon, etc., to the defendant Griffin, who has since sold or secreted the same. Perry being insolvent, the securities insist that they have a right to go into a court of equity to enforce the statutory mortgage in favor of the executors, before paying or otherwise securing the debt. This is briefly the case as presented by the original and amended bill—which may be considered as one bill—the amended bill being intended to correct certain errors as to fact in the original bill.

The first, and indeed the only, question requiring consideration is whether the securities, before paying or securing the debt, can be subrogated to the rights of the executors, or compel them to resort to the mortgaged property, before proceeding to collect the debt from the securities.

This point has been settled by this court in the Bank of England v. Tarleton et al., 23 Miss. 182. The court in that case say: "The privilege of substitution in behalf of a surety who has paid the debt of his principal is of purely equitable origin, and is based exclusively on the principles of natural justice. It has been uniformly held to exist only in cases where the surety has actually paid, or has secured the payment of, the debt due by his principal."

This would be the rule which would govern the case presented by the original bill, alleging the property to be in the possession of the sub-vendee, Griffin. But the rule could not even be so favorably applied under the amended bill, which alleges that the property has been either disposed of or secreted by the sub-vendee. The question in such case is, not whether the executors shall first proceed to subject the property to the payment of the debt, but whether they shall proceed to hold the sub-vendee liable by an action or proceeding to recover damages before proceeding against the sureties.

[4] The arguments of counsel are omitted.

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A bill, no doubt, before payment, could be maintained by the sureties, to prevent the parties from selling or otherwise disposing of the property; but, when such disposition was made before the bill was filed, it is then merely a question of damages, if there be any remedy at all against the parties.

Decree affirmed.[5]

ORVIS v. NEWELL.

(Supreme Court of Errors of Connecticut, 1845. 17 Conn. 97.)

This was a bill in chancery, brought originally by Roger S. Newell against William Orvis and Ebenezer Orvis, for a decree of foreclosure. The bill stated that the defendants, on the 3d of January, 1842, mortgaged six pieces of land in Farmington to the First School Society of Farmington, to secure the payment of a note given by them and Adna Whiting, on the 17th of January, 1837, in which, for value received, they jointly and severally promised to pay, on demand, the sum of $450, with annual interest; that on the 6th of May, 1843, the First School Society of Farmington assigned all their interest in the note and mortgage to the plaintiff, by virtue of which he became the legal owner thereof; and that no part of the mortgage debt had ever been paid.

William Orvis filed a cross-bill, showing that, of the six pieces of land in the plaintiff's bill mentioned, three were his own property and three the property of Ebenezer Orvis; that he was merely a surety for Ebenezer, whose duty it was to pay the mortgage debt; that on the 16th of February, 1842, Ebenezer mortgaged one of his aforesaid pieces of land to Newell to secure a note for $100, which last-mentioned mortgage Newell has since foreclosed; praying that, upon his paying the school society debt, Newell should be compelled to convey to him all the right derived from the first-mentioned mortgage.

The court found the facts stated in the bill and the cross-bill to be true, and passed a decree in the usual form, regarding the first mortgage, and further decreed that, if William Orvis should pay to Newell both debts, Newell should convey all his interest in all the mortgaged lands to him.

This decree William Orvis sought, by motion in error, to reverse.[6]

WILLIAMS, C. J. The facts stated and found, so far as they are important to the question arising in the case, are these: William and Ebenezer Orvis were indebted, jointly and severally, in a debt now the property of Newell, and secured by lands owned by them individually; William owning three pieces and Ebenezer three. Ebenezer, being indebted to the plaintiff, Newell, mortgages one of his pieces of

[5] Accord: Gilliam v. Esselman, 5 Sneed (Tenn.) 86 (1857).

[6] Arguments of counsel are omitted.

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land to Newell; and William Orvis claims to redeem, paying the first mortgage only, as he was a mere surety for his son Ebenezer. On the other hand, Newell claims that, if he would redeem Ebenezer Orvis's land, he must pay all the charges upon it, before he can be entitled to it.

William Orvis rests his claim upon the fact that he is surety, and as a surety, upon payment of the debt, is entitled to all the benefits which the creditor was entitled to, by virtue of the original mortgage; and there can be no doubt that as between him and his principal and the creditor, who knows of this relation, this position is correct.

But the claim of William Orvis goes further, and extends to all persons deriving title under Ebenezer Orvis. He says such persons can have no greater rights than Ebenezer Orvis himself; that Ebenezer had no equity until this debt was paid, and so his creditors can have none. It is, however, to be remarked "that this right of substitution or subrogation rests upon the basis of mere equity and benevolence" (Phillips v. Thompson, 2 Johns. Ch. 419, 7 Am. Dec. 535), and it is not to be applied so as to defeat the very equity which led to its adoption. This has been attempted, in several cases, and has met with no countenance from this court. Belcher v. Hartford Bank, 15 Conn. 381; Stamford Bank v. Benedict, 15 Conn. 437. There are many cases where a bona fide purchaser can acquire rights, which the vendor himself had not—as where one purchases from another an article which he had no right to sell, but the owner stands by, without objecting; or where one purchases bona fide of a person who had before conveyed by a fraudulent deed, or by a good deed which remains unrecorded. In this case, Newell is in a condition similar to that last-mentioned; he is a bona fide purchaser of Ebenezer Orvis, to the extent of his debt, having no knowledge of the claims of any other person, so far as the records show. He examines the title; he finds no incumbrance, except that of the school society; and he finds that this debt rests upon five other pieces of land. He makes his calculations, therefore, and becomes satisfied that if this debt is paid from three several pieces of land, in equal proportions, there is enough left to pay his debt, by the land on which he takes a new mortgage. Why then shall he not be protected in it? He is ready to do entire justice to the real creditor, and does it, by paying him his debt, thus gaining to himself adequate security for his own debt.

But then he is met by a claim, which the original creditor could not have made, a claim in fact that this incumbrance, spread over six pieces of land, should be paid by three of them; in short, he is surprised, by the springing up of a private invisible mortgage, unknown to the law, but which, he claims, is the offspring of equity, by which his supposed security is rendered worthless. Had William Orvis taken a mortgage deed from Ebenezer to secure him from this suretyship, it would have availed him nothing, unless he had put it upon record. And is it possible that this invisible lien, resting upon the mere basis of equity, the mere creature of equity, and to be moulded by the

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principles of equity, is to have an operation which a deed itself could not have? In short, is the implied contract, raised by a court of equity, more extensive and efficient than an actual agreement to the same effect, made by the parties, would have been?

No writings between these parties show that William Orvis was a surety. If Newell looks at the note, he finds it is signed by Ebenezer and William, jointly and severally. If he looks at the deed, he finds it is given to secure that note. Now, if a deed of land is given to two or more, the rule of law is that they take in equal proportions. Treadwell v. Bulkley, 4 Day, 395, 4 Am. Dec. 225; 1 Sw. Dig. 104. It is so in a conveyance of personal property. So an obligation to two or more persons implies they are equal owners. And so, if there are several partners, it is supposed they are partners in equal shares. In case of personal property, however, it may be shown that the fact is otherwise. On the other hand, if two sign a receipt for money had, or an obligation that they will pay money, the import is that they have received it, and will pay it, equally. But it was held in Stratton v. Rastall, 2 Term R. 366 (by two judges to one), that one of the signers of a receipt might show he was a surety, and that the parties did not stand exactly in the relation that the writing seemed to import. The same has been holden with respect to the signers of a note. Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254. And so it was held, by the superior court, in this case.

This, however, is not all. To claim the rights of a surety, it must be shown that those who are to be affected by it know the fact, or had the means of knowing it. Thus, in the case of Stratton v. Rastall, the court proceeded upon the ground that that fact is admitted by the answer. In Harris v. Brooks, where it was claimed that a joint signer of the note was a surety, and discharged by certain conditions of the plaintiff, the judge left it to the jury whether he was a surety, and that known to the holders; and it was said, by the Chief Justice, that the words "principal" and "surety" would not affect the terms of the contract, but indicate the relations the parties stood in to each other, and not such relations to the holder; and he said, further, that the presumption that they were equally responsible might be rebutted, by showing that one signed as a surety for the other. And in the case of Neimcewicz v. Gahn, where a wife had mortgaged her own property to secure the bond debt of her husband, the court held that she was to be treated as surety for her husband, but that the fact of suretyship must be proved; it not appearing upon the face of the instrument. 3 Paige, 651. This case was taken to the Supreme Court of Errors, and the decree affirmed, without a dissenting opinion, except on the point whether there was evidence of knowledge of that fact. 11 Wend. 312.

It was said in the argument that Newell had constructive notice from the record that this land was pledged for this debt and must be applied to that purpose. He had, indeed; but he did not know that

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three pieces of the six were first to be taken for this purpose, and that is the very difficulty of the case. By the record he could see that the land, and the whole land, was devoted to that object; and William Orvis would now show that the only part of the land, viz., that of Ebenezer Orvis, should be first taken, and, of course, that the whole land was not so pledged, unless the whole was necessary to pay the debt.

It is said there was here enough to put the party upon inquiry. If the presumption of law is as has been shown, we see nothing for him to inquire about. If these writings had a legal import, such as we have shown, he might fairly act accordingly. If he looked at the deed, he would get all the notice in relation to their contract that the parties had chosen to publish to the world. If he went further, and examined the note, he obtained all that they chose to give even to those with whom they immediately contracted. The case is not like that of Bolles v. Chauncey, 8 Conn. 390, where, there having been record evidence given, the court held that the party who acted in face of that notice must see that he gained true information, or must suffer for it. Here is no intimation from the record or the note of the real state of facts as now claimed by the party; of course, nothing is shown to excite inquiry. The case from New York, above cited, was a much stronger case. There the debt, upon its face, appeared to be the husband's debt; but, as it might have been contracted for the benefit of the wife's estate, the court held that the creditor was justified in treating her as a principal; and Nelson, C. J., says that, to discharge the surety, not only the fact of suretyship must exist, but it must be known to the creditor, at the time complained of. If the fact appear upon the face of the security, that is enough; if not, the knowledge of it must be brought home to the creditor, by the surety, clearly and satisfactorily, because, as all parties appear upon the instrument as principals, it is deceptive and calculated to mislead. The surety, therefore, should be holden to strict proof.

Apply the reasoning of the learned judge to this case. If William Orvis would claim the right of a surety, and he appears as a surety upon the note and deed, that is enough; if not, he must bring home to Newell, the creditor, clearly and satisfactorily, knowledge of the fact that he was surety, instead of saying he was put on inquiry. But there is here no pretense that Newell had knowledge. William Orvis, instead of appearing on the written instruments as a surety, gives the public to understand he is principal; and now, when a third person has, upon faith of this supposed fact, placed his property in the hands of another party to this contract, William Orvis throws himself upon his unknown, invisible rights as surety, and asks the aid of a court of equity to protect him in that character.

Something was said that, as our law does not allow of tacking mortgages, Newell could not tack his last debt to the former. We cannot see anything in this case analogous to the doctrine of tack-

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ing, repudiated by our courts. We have, indeed, held that the creditor could not tack a debt not secured by mortgage onto his mortgage debt; nor could he tack a subsequent mortgage to a prior one against an intervening incumbrance. But it has not been decided that the mortgagor could not tack another incumbrance onto that which he had already given, and that this would not be valid against an implied or equitable incumbrance.

On the whole, we are of opinion that neither principle nor authority is shown to require the reversal of this judgment.

In this opinion the other Judges concurred.

Judgment affirmed.

DIXON v. STEEL et al.

(Supreme Court of Judicature, Chancery Division, [1901] L. R. 2 Ch. Div. 602.)

This was a summons by a married woman to redeem leasehold house property which she had mortgaged to secure a debt of her husband, secured also on a leasehold house of the husband. The defendants were the mortgagees and the husband. The mortgagees were also judgment creditors of the husband in respect of a debt not covered by the mortgage. They had obtained equitable execution of the husband's interest in his mortgaged property. The husband's mortgaged property had been sold by order of the court in the proceedings to enforce equitable execution. The question now before the court on further consideration was whether the plaintiff was entitled to have the whole of the sum realized taken into account in ascertaining the amount of redemption money, or whether the mortgagees were entitled to payment of their judgment debt and costs, so that the balance only of the amount realized should be deducted from the mortgage debt in ascertaining what was due. The facts are set out in more detail in the judgment.[7]

COZENS-HARDY, J. By a mortgage dated January 12, 1894, John Dixon mortgaged certain property (A) to Thomas Steel to secure £225. and interest. By a mortgage dated March 20, 1896, Mrs. Dixon mortgaged certain other property (B) to Thomas Steel to secure £275. and interest.

By a mortgage dated August 5, 1896, and made between John Dixon of the first part, Mrs. Dixon of the second part, and Thomas Steel of the third part, in consideration of £500. advanced by Thomas Steel to John Dixon, John Dixon and his wife jointly and severally covenanted to pay the £500. with interest; and John Dixon as to property A, and Mrs. Dixon as to property B, charged the properties with the £500. and interest. And Mrs. Dixon mortgaged certain other property (C) to Thomas Steel to secure the £500., and also the two sums of £225. and £275. secured by the prior mortgages.

[7] The arguments of counsel are omitted.

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The £500. advanced on this security had been paid off, but the deed was used again as security for a sum of £500. advanced by Thomas Steel on April 20, 1898. It had never ceased to be a further security for the £225. and £275.

On the evidence I am satisfied that Mrs. Dixon was only a surety for her husband.

On June 13, 1899, Messrs. Steel, Maitland & Steel, who were judgment creditors of John Dixon, obtained equitable execution against him. Before this date they had been informed that Mrs. Dixon was a surety for her husband.

On August 14, 1899, Thomas Steel transferred all his mortgages to Messrs. Steel, Maitland & Steel.

By an order made by North, J., on December 2, 1899, in the matter of the statute 27 & 28 Vict. c. 112, an act to amend the law relating to future judgments, statutes, and recognizances, and in the matter of John Dixon, on the application of Messrs. Steel, Maitland & Steel, certain inquiries were directed to ascertain what was due under the judgment, what interests in land of the said John Dixon had been delivered in execution, and what liens, charges, and incumbrances there were.

The master made his certificate, dated April 3, 1900, and found that the property delivered in execution was an equity of redemption in property A, and that the incumbrances were the mortgages of January 12, 1894, and August 5, 1896, but that Mrs. Dixon claimed to be party to the mortgage of August 5, 1896, as surety for John Dixon.

Pursuant to subsequent orders, the property was sold for £375. to one Thomas Stockdale, who was authorized to pay to Messrs. Steel, Maitland & Steel, as transferees of the first mortgage, the amount due on that mortgage. Messrs. Steel, Maitland & Steel have since received the balance of the purchase money, £130. 4s. 1d., and claim to apply it towards satisfaction of their judgment debt.

This action was commenced by Mrs. Dixon as plaintiff against Messrs. Steel, Maitland & Steel and John Dixon as defendants to redeem property C, and the only question is whether Messrs. Steel, Maitland & Steel are justified in applying that sum towards satisfaction of their judgment debt, or whether it ought not to go in relief of Mrs. Dixon's mortgage.

This sum represents the equity of redemption in A. That equity of redemption was charged together with C with the £500. As between A and C, A was primarily liable. This primary liability cannot be affected by the subsequent incumbrance created by the delivery of A in execution. The money must be applied in partial satisfaction of the £500. secured on C, the surety's property.

The case thus put does not seem to present much difficulty. But it was urged by Mr. Martelli in his very able argument that as the surety has paid nothing her right has not arisen, and he relied upon some observations by Wood, V. C., in South v. Bloxam, 2 H. & M. 457,

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in support of this contention. It is necessary to consider what was decided in that case.

Arnold mortgaged (a) and (b) to Marcon for £2,800.; his mother, Susannah Arnold, joining as surety in the covenant for payment. After the surety's death Arnold gave a further charge to Marcon on (a) and (b) for £600. Subsequently Arnold mortgaged (a) to the plaintiffs to secure £2,000.

In March, 1853, Marcon commenced an action against the defendant Bloxam, the surety's executor, upon her covenant in the mortgage deed. Before the defendant pleaded, Marcon had sold (a) for a sum less than was due on the first mortgage. He sought to pay off his further charge of £600. out of this sum. The defendant succeeded as to the £600., but failed on other points. The court ordered the defendant to pay the balance of the debt and interest and costs, and thereupon Marcon was to assign (b) to the defendant, and this was done. See Marcon v. Bloxam (1856) 11 Ex. 586. The defendant's own costs of action were £658. In 1859 the defendant received £2,800. in respect of (b), being the amount of two policies on the mortgagor Arnold's life. The plaintiffs in 1863 filed a bill claiming to have the balance of the policy moneys after payment of the first mortgage marshaled, so as to make good pro tanto what had been taken from (a) towards payment of the first mortgage. Wood, V. C., held the plaintiffs entitled. His judgment, so far as material, is as follows (2 H. & M. 462):

"Upon these facts the usual equity of marshaling is claimed in favor of the second mortgagees, who insist that they are entitled to be recouped, out of any balance of the policy moneys remaining after satisfaction of the first mortgage, the amount which was realized from the chattels and applied towards payment of the first mortgage. The plaintiffs would clearly be entitled to payment out of this balance if the whole property had been included in both mortgages, and (the balance being less than the sum obtained by the sale of the chattels) the same right arises in the actual circumstances on the principle of marshaling, subject to any right which may arise from the defendant's position as surety. Now, what are the rights of a surety? His right arises as soon as he pays the debt due from his principal, and not before. Until such payment, the fact of a person having become surety for a mortgage debt in no way prevents the principal from dealing with the property by assigning it to a second mortgagee. The surety's right is not like a charge created in the inception of the deed and to arise on a certain contingency, but only a possibility of the principal becoming indebted to him for what he may pay towards the debt, and for any costs he may incur by reason of his suretyship.

"In this case the surety, when called upon to pay, disputed his liability. Of course he was justified in having an account taken of what was due on the mortgage. So far there could be no complaint of his conduct; but he went further, and raised other questions which

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occasioned enormous costs. In this contest he partially failed, and did not succeed in reducing the claim against himself, except by an amount less than the costs incurred, and did not effect any reduction of the claim, which took priority over the second mortgage, except by some trifling rectification of interest.

"Upon paying the debt and costs of the action, the defendant as surety became entitled to take from the first mortgagees their security for principal, interest, and costs; and as between himself and the mortgagor (if there had been no second mortgage), the mortgagor would be liable to repay all the surety's expenses, and probably would not have been entitled to redeem the security without making such further payment. This question does not depend on the principle of Copis v. Middleton (1823) T. & R. 224, 229, 29 R. R. 73, note. There, when the bond was paid, there was no security for the surety to take; but that is no reason why, when there is a security, the principal should be allowed to get back the property without first paying the expenses which his surety has incurred.

"As against a second mortgagee the case is very different. The debt recovered in the action was less than £500. The costs paid by the defendant were nearly £1,100., of which £658. were costs of his defense. As regards these costs of defense, I do not think that the defendant can charge any part of them against the second mortgagees. They became a debt from the mortgagor to the surety, but the possibility of such a debt arising at a future time does not prevent the mortgagor from executing an effectual second mortgage. As to the costs paid to the plaintiff in the action, it is clear that the defendant cannot be allowed to charge any costs which were not incurred for the benefit of the estate and all persons interested in it after the first mortgagees."

This only decided that the surety was not entitled to tack to his security as against a second mortgagee costs incurred in resisting the creditor's claim, except so far as they were properly incurred for the benefit of the estate. It does not seem to me to have any bearing on the present case. The observations of Wood, V. C., must be read with reference to the particular point with which he was dealing. It certainly is not the law that a surety has no rights until he pays the debt due from his principal.

I must, therefore, declare that the £130. 4s. 1d. is to be taken in reduction of the £500. mortgage debt.

I understand that the figures are agreed, except as to this sum, and that a proper tender was made by the plaintiff.

The defendants other than John Dixon must pay the costs of the action.†

† Accord: Drew v. Lockett, 32 Beav. 499 (1863); Forbes v. Jackson, 19 Ch. Div. 615 (1882); also National, etc., Bank v. Silliman, 65 N. Y. 475 (1875), post, p. 283.

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NATIONAL EXCHANGE BANK OF LANSINGBURGH v. SILLIMAN et al.

(Commission of Appeals of New York. 1875. 65 N. Y. 475.)

Appeal from judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought against the defendants as second indorsers of a note made by E. Babcock, on or about May 19, 1864, payable to the order of S. E. Babcock, and indorsed by him. The indorsement of the defendants was in their firm name, of Silliman, Matthews & Co. The answer admits the making and indorsement of the note, but denies the other allegations of the complaint. It also alleges that, at the time of the commencement of the action, E. Babcock and S. E. Babcock, the maker and indorser, transacted business and kept an account with the plaintiff, and that during a greater part of the time intervening between May 19, 1864, and the commencement of this action, and at the maturity of the note, the plaintiff held securities, pledged to it by E. Babcock and S. E. Babcock, as collateral securities for all moneys advanced to them upon business paper, of which the note in litigation was a part. It was further set forth that, after the maturity of the note, the plaintiff had sufficient funds in its possession belonging to the Babcocks to pay and satisfy the note and all other indebtedness due from them, which it was its legal duty to apply to such indebtedness, and to discharge the defendants from their liability, and the defendants were accommodation indorsers, receiving no consideration or benefit from their indorsements.

It appeared, at the trial, that previous to the opening of an account with the plaintiff's bank, and obtaining loans therefrom, the Babcocks deposited collaterals belonging to Armena Babcock, wife of E. Babcock, and mother of S. E. Babcock, as security for the transactions between the parties. There was a dispute as to whether the collaterals were given to secure loans or discounts, or whether no discretion whatever was given on this subject. The evidence bearing on this point is stated in the opinion.

After the note in litigation was discounted, and before its maturity, viz., March 16, 1864, the plaintiff purchased of the firm of I. E. & T. C. Spicer & Co. a note made by S. E. Babcock and indorsed by E. Babcock, which was past due, and at the same time executed to the Spicers an agreement in writing, whereby, after reciting the purchase of the note of $300, dated December 23, 1863, it promised to pay the Spicers the sum of $250 and interest thereon, provided the said bank collects the whole amount of the said note, and if only a portion of the amount due should be collected, then it was to pay Spicer & Co. such portion of that amount as $250 bears to $300, the costs and expenses of collection being deducted before distribution.

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The court held that a balance of moneys realized from a sale of the collaterals, amounting to $305.29, besides interest, should be applied pro rata upon the Spicer note and that in litigation, and, under exception, directed a verdict in favor of the plaintiffs for the sum of $256.56, to which defendants' counsel duly excepted.

Other exceptions taken in this case are sufficiently referred to in the opinion.[8]

DWIGHT, C. The leading question in this cause concerns the right of the defendant to insist that the proceeds of certain collateral securities held by the plaintiff shall be applied in their favor, in preference to a note which the plaintiff had purchased after maturity. The argument of the defendants is that the collaterals were deposited as a security for loans and discounts made to the Babcocks by the bank, and cannot be applied (certainly as between themselves and the plaintiff) to the payment of a note purchased after maturity and dishonor. They urge that the collateral securities were given solely to secure loans and discounts made to the Babcocks, and therefore cannot be used to pay notes purchased after they were due.

The evidence bearing upon the use to be made of the collaterals is quite meager. The cashier of the plaintiff testified that he received the collaterals before any loans were made, and that they came from Armena Babcock, wife of the maker and mother of the first indorser of the note. They consisted of several mortgages upon canal boats, pumps and fixtures. The purpose was stated in the mortgages, but it was not disclosed in the evidence. The question thus arises whether, in the absence of evidence bearing upon the intent of the parties, the presumption is that the securities were given to cover all claims which the bank might in any manner acquire, or only such as were in some way beneficial to the Babcocks? It seems to me that the latter view is the correct one. The collaterals were deposited by the wife and mother of the persons primarily liable. She herself held the position of surety towards them. It is reasonable to suppose that by placing the property with the bank she intended to render a service to her relatives. They might receive substantial aid by loans and discounts. Of what possible benefit could it be to the Babcocks to have the bank buy their paper after maturity? What reason can be suggested why Mrs. Babcock should sacrifice her property to protect the bank? The Spicers, holders of the dishonored note, had no security, and might, of course, have instantly pressed for the payment. So could the bank after its purchase. The plaintiff asks us to presume that the object of Mrs. Babcock was to devote her property to the payment of a debt in its hands, under a transaction from which her relatives could, apparently, derive no benefit. This presumption is so unnatural and improbable that I do not see that it can be entertained.

There is, however, another objection to the plaintiff's right to apply

[8] The arguments of counsel are omitted.

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the proceeds of the collaterals to the Spicer claim. The defendants, as indorsers, according to general principles of law, being sureties, were at once entitled to be subrogated to the claim of the plaintiff. Their right to subrogation accrued as soon as their liability attached, as the collaterals became a trust fund for the payment of the note on which they were indorsers. Butler v. Birkey, 13 Ohio St. 514; Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866; Roberts v. Colvin, 3 Grat. (Va.) 358; Agnew v. Bell, 4 Watts (Pa.) 31; Hays v. Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554. The rule must be applied in favor of indorsers as well as other sureties. Bennett v. Cook, 45 N. Y. 268. In that case, a holder of a promissory note, having a collateral security in his possession, was held legally bound to apply it in favor of the indorser against whom he enforced his claim. See, also, Vail v. Foster, 4 N. Y. 312.

The only doubt that can arise in the case at bar is whether the defendants can insist on a priority of application of the proceeds of the collaterals, or whether they are only entitled to share in them, pari passu, with the plaintiff as holder of the Spicer note. I think that the presumption is that the equity of a surety attaches to the trust fund as soon as the trust relation is created, and that the burden of proof is on any one who asserts the contrary to establish it. Undoubtedly an arrangement might be made whereby the right of subrogation might be qualified or modified by agreement, so that subsequent sureties, on wholly different and later claims, might participate in the benefit of collateral securities. This would not be the ordinary rule, and some evidence would be required to establish its existence in a particular case. The same rule must be applied to a creditor making subsequent advances to the debtor who deposited the collaterals; while as between him and the debtor, they might be applied to all the claims ratably, yet as to the surety they could not be, unless he knew, or had reason to know, that such was the fair intent of the transaction. The ordinary interpretation of the dealings of the parties would be that the surety, when he undertook his liability, acquired, in equity, a lien upon the fund, which the creditor could not displace. No evidence was offered by the bank that the defendants knew or assented to a transaction so entirely different from a loan as the purchase of the overdue Spicer note, and, accordingly, on general principles of law, they must be deemed to have a superior claim in equity to the Babcock collaterals. It is not necessary to contend that these rules would be applicable if the collaterals were deposited as security for one transaction consisting of several parts or branches. In that case it may be that there are no superior equities, and that the collaterals must be applied to the entire indebtedness. This was so held in Farebrother v. Wodehouse, 23 Beavan, 18. The case was placed distinctly on the ground that, at the very time that the surety entered into his obligation, there was a loan of two sums by the same creditor to the same debtor, of which the surety was made aware. The case at bar would resemble

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it if it should be supposed that a number of notes were discounted at one time, and on one of them there was an indorser, and on others none, and the indorser knew all the facts; even then the doctrine of tacking would need to be invoked to shut out the surety. Whether that could be applied in our law I need not consider. What now is claimed is that the rule of priority must prevail where the transactions are distinct and unconnected, and that where they are apparently separate the burden of proof is on the creditor to show their connection, and thus to overcome the rule of priority.

The principles thus stated are sustained by the authorities. In Bowker v. Bull, 1 Sim. (N. S.) 29, it appeared that A. had mortgaged his estates to B. to secure the sum of £6,000. His daughters, as sureties, also mortgaged their property to secure the same loan. There was a statement in the deeds, without prejudice to any of the rights of the mortgagee, that, as between A. and the daughters, A. and his estates were primarily liable for the debt. Six years afterwards A. mortgaged the property embraced in the first mortgage to B., to secure an additional loan of £700. It was held that A. was not entitled, as against A.'s daughters, to tack the second mortgage to the first, but that the daughters were entitled to redeem the first mortgage on payment of £6,000. What the daughters insisted upon was that, if they paid off the first mortgage debt, they should be subrogated to B.'s rights without reference to the second loan, and the court held that they were right. The court said: "On the part of the children it was contended that Bowker (the creditor) must be postponed to them as far as relates to the latter charge, and I think that they are right. The children are, according to what appears on the face of the deed, mere sureties for their father. Bowker, when he took his further charge, in 1849, had full notice of this, and he could, therefore, only take subject to such rights as the daughters had acquired by reason of their having concurred in the former deed. Now, it is quite clear that a surety paying off the debt of his principal is entitled to a transfer of all the securities held by the creditor, in order that he may make them available against the debtor, as the original creditor might have done. On these grounds the daughters were certainly entitled, on paying off the £6,000. mortgage, to have all the securities comprised in the deed of the 3d of March, 1843, made over to them, in order to enable them to reimburse themselves out of their father's separate property, comprised in that deed, whatever portion of the £6,000. they might have been obliged to pay; and this is a demand, certainly, prior in point of date to the last mortgage. It was urged at the bar, on behalf of Bowker, that this right of a surety was only a potential equity, which, though it may be asserted by the party himself, yet cannot bind third persons. But I cannot agree to this. The equity gives to the surety a right to call for the transfer of the securities, and so binds those securities, into whatever hands they may come, with notice of the charge." Page 34.

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It will be observed that the leading points in this argument are that the two transactions are distinct and that the creditor, in making his advances upon the second mortgage, was aware of the rights of the surety. This fact also exists in the case at bar, as the bank knew that the defendants were indorsers and that the property deposited by Mrs. Babcock was held as collateral. This conclusion might be modified in England under the special rules applicable to the tacking of mortgages. It may plausibly be argued there that, as it is a recognized rule of law that a mortgagee may thus tack a second mortgage to the first, a surety on the first mortgage tacitly consented to such an act of tacking, and therefore could not insist that the first mortgage should be applied, under the doctrines of subrogation, to his relief. Such was, apparently, the view in Williams v. Owen, 13 Sim. 597. Independent of that doctrine, the rule is now well settled in favor of the surety's priority. See Pearl v. Deacon, 24 Beavan, 186, s. c. on appeal 1 De Gex & Jones, 461. In this case certain landlords advanced money to their tenant on a joint note of himself and a surety. They afterwards took collateral security for this sum by an assignment of the furniture of the tenant by way of mortgage. They then proceeded to distrain upon the furniture for rent due. It was held that this act discharged the surety. This was no more than holding that, if the security had been appropriated to a particular debt, it could not be diverted by the creditor to pay any other claim which he might have.

This case, steering entirely clear of any doctrine of tacking, as applicable to mortgages—an anomaly in the law, and recently abolished (see 37 & 38 Vict. c. 78, § 7, A. D. 1874)—shows the rule upon its merits as enforced in favor of sureties. Reference should also be made to Drew v. Lockett, 32 Beav. 499, 9 Jur. (N. S.) 786, and Smith v. Bloxam, 2 H. & M. 457. The first of these cases involved the question of the priority of the surety to a creditor who had made subsequent advances with knowledge of the relations of the parties. The court laid down the general rule that the surety is entitled to be subrogated at once to any security held by the creditor, and only admitted an exception when the special facts of the case showed that the surety knew that if the mortgagee, the payment of whose debt he guaranteed, advanced any further money to the mortgagor on the security of the same property he would be entitled to tack the further advances to his original claim. I have found no case defeating or qualifying the surety's right of subrogation, unless it proceeded on the theory of tacking and the knowledge by the surety, either expressly or by implication, that the right to tack existed. In Smith v. Bloxam, the right of the surety to subrogation was fully recognized, though the court declined to extend it so far as to include as against a subsequent mortgagee the costs of a personal action against the surety unsuccessfully defended by him.

The result of the whole discussion is that, as far as appears in the case at bar, the plaintiff was bound to hold the collateral security sup-

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plied by the Babcocks in trust for the defendants, who had a legal priority over the plaintiff's claim under the Spicer note. It was incumbent on the plaintiff, to avoid this result, to show that it was within the contemplation of the parties that the security should be applied ratably to the payment of that note. Assume that the bank had not bought the Spicer note; it is then entirely clear that the defendants would have been entitled to enough of the Babcock collaterals to have paid off the entire claim against themselves. Then suppose, while matters are in this condition, the Spicer note is purchased; must not the bank show affirmatively its right thus to cut down and reduce the claim of the defendants to subrogation which had already apparently attached to the entire amount of their debt? The cashier of the bank testified that the Babcocks gave him no direction in what way to apply the money received from the collaterals, and that there was no direction given as to their application in any form.

Under this state of facts the presumption must be, in the absence of proof, that the ordinary right to subrogation attached to the defendants' note as it was discounted. The plaintiff having made no such proof, the court below erred in the result to which it arrived, and its judgment should be reversed. All concur on the ground first discussed, without expressing any opinion upon the second ground.

Judgment reversed.[9]

CROFT v. MOORE.

(Supreme Court of Pennsylvania, 1840. 9 Watts, 451.)

Error to the Common Pleas of Cumberland County.

John Moore against George Croft. This was a question of substitution, arising out of the following facts:

On the 14th of May, 1830, John D. Mahan executed a promissory note to George Croft, Samuel Galbraith and John Moore, for the payment of $900 in four months, who indorsed it to the Harrisburg Bank, by whom it was discounted. A suit was brought upon this note against them, and judgment obtained in 1831. An execution was issued and the money was paid to the sheriff by John Moore and Samuel Galbraith. After the payment of it, John Moore obtained a rule upon George Croft, to show cause why he should not be substituted as plaintiff to the amount of the one-sixth part of the judgment which he paid for him.

This was resisted by George Croft on two grounds: First, that substitution was not a proper remedy as between sureties, but only as between principal and surety; and, secondly, that in consequence of the relation which existed between John Moore and John D. Mahan, the

[9] On constructive notice to purchaser, arising from the statute giving the right of subrogation under a judgment, see Downey v. Washburn, 79 Ind. 242 (1881).

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principal, as partners, the former had not such an equity as entitled him to substitution. The facts appeared to be that after the note was discounted by the bank the proceeds were paid to John Moore upon the check of Croft, Galbraith and Moore, the indorsers; that John D. Mahan, Jacob M. Haldeman and John Moore were partners in the iron business at the time, and that the proceeds of the note were placed to the credit of John D. Mahan, upon his stock account, he being deficient in the amount which he had agreed to bring into the partnership.

HEPBURN, President [of the Common Pleas]: "The facts, so far as we are capable of understanding them in the present application, make it the ordinary one of a joint surety, having paid the debt to their common creditor, asking to be subrogated to the rights of that creditor in the judgment paid by him against his co-surety, who paid nothing. That he has such right is, I think, clearly settled in the case of Cayler v. Ensworth, 6 Page, 32, Amer. Jur. No. 41, p. 192. "Joint sureties are bound, as between themselves, to contribute equally to discharge the debt for which they are jointly holden; and if one of them pays the whole, he is in equity subrogated to all the rights and remedies of the original creditor for the payment of his debt, not only as against the principal debtor, but also as against the co-sureties, to the extent they are equitably bound to contribute." Nothing more is asked for here, and we think the rule should be made absolute.[10]

GIBSON, C. J. As a remedy between surety and principal, or between sureties themselves, subrogation to the ownership of the security has advantages which must always incline courts of equity to favor it. As each co-surety is separately liable at law for no more than an aliquot part to one who has paid the whole, an action for contribution has this disadvantage, that it leaves him who has paid more than his part exposed to a possibility of loss from insolvency of any one of the contributors, which a bill in equity does not. 1 Bos. & Pul. 268; Peter v. Rich, 1 Ch. R. 45; 1 Ch. R. 19. Besides, as was said in Craythorne v. Swinburne, 14 Ves. 164, separate actions, where the contributors are numerous, must be attended with many difficulties. All this may be avoided by substituting the surety for the creditor, and enabling him, by means of the control which the ownership of the security gives him, to apply it so as to divide the burden equably among all. The doctrine of assignment, however, is rejected by Mr. Justice Story (Eq. Juris. 472, note 2), who, on the authority of Gammon v. Stone, 1 Ves. 339, and Wolfley v. Sparks, 2 Ves. 529, contest the position of Chancellor Kent in Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 413, 7 Am. Dec. 494, and Avery v. Petten, 7 Johns. Ch. (N. Y.) 211, that a surety who has paid the debt is entitled to an assignment of the security against his principal or co-surety. The Chancellor relied on

[10] The argument of counsel is omitted.

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Morgan v. Seymour, 1 Ch. R. 150, 3 Ch. R. 64, and Ex parte Crisp, 1 Atk. 35, in which the point was directly adjudged, to which he would doubtless have added Glossop v. Harrison, Cooper, 61, had it been known in this country at the time, but it was made only a few months before. In that case the surety of a receiver of the opera house, who had advanced money to his principal, which the principal had misapplied by paying it to the tradesmen of the house, instead of the bankers of the trustees, was let in on a balance due to the receiver on the settlement of his account. Now, though there was no actual assignment to him of the tradesmen's bills, it was by being put in their place, and not in the place of the receiver, who had assigned away his interest in the fund, that the surety was relieved. To have put him in the receiver's place after he had parted with his ownership would have been to do nothing; and to put him in the tradesmen's place would have been to do no more, if the previous payment of their bills had been considered an extinguishment of them in equity as well as at law.

Now the entire ground of the decisions in the elder Vesey's Reports, on which Mr. Justice Story relies, is the technical effect of payment at law, from which it was inferred that, as the principal or cosurety might plead it in bar, the assignment of an exploded security would be nugatory. But this last case proves that what is very payment at law may not be payment at all in equity; and, where that is the case, it is shown by Parsons v. Briddock, 2 Vern. 608, that an assignment of the security will be enforced. In that case, sureties, who had paid the debt when separately sued, were decreed to have an assignment of a judgment obtained against special bail of the principal, who had also been separately sued, on the ground that bail stand in the place of their principal. Now, though the original bond was joint and several, yet payment of the surety's several bond would, at law, equally discharge the several bond of the principal; and, had it been thought that the surety's payment had discharged it also in equity, the same objection would have lain, and doubtless would have been made, to an assignment of the judgment against the principal's bail, as was made in Wolfley v. Sparks, that the law court would be bound to set aside any execution which the sureties might issue on it. If payment by one extinguishes the debt as to all, it necessarily extinguishes all the securities given for it, whether joint or several; and it is, therefore, no answer to the preceding case to say that, as the bond was sued severally, the judgment against the principal debtor's bail was collateral, and that it is not disputed that a surety is entitled to all the creditor's securities of that stamp. Either the point was erroneously decided, or payment has not the extreme effect ascribed to it.

It is indeed asserted by Mr. Theobald, in his treatise on the Law of Principal and Surety (page 259), on what authority I know not, that "it is now held that sureties are entitled to stand in the place of the creditor, and to have the same remedies as he would have had, only

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in respect of collateral securities, and that the payment of a specialty debt by the surety makes him only a simple contract creditor"—an assertion which is incompatible with what he had said, in the beginning of the same chapter, that "a surety is entitled to every remedy which the creditor has against the principal debtor." That, however, was an assertion of counsel, which he erroneously attributed to the Lord Chancellor, but which bears so directly on the point at issue as to have induced Mr. Justice Story to strip it of its pseudo-judicial character. But the question may still, perhaps, be considered as an open one, wherever there is a formal administration of equity, though it must be admitted that the weight of authority is on the side of Chancellor Kent. Nor can it be disputed that the reason given for the two decisions on the other side is more technical than solid. If, as seems to be proved by Parsons v. Briddock and Glossop v. Harrison, payment at law may leave the demand a subsisting one in equity, it is inconceivable that the same power which can restrain a plaintiff from suing at law for an inequitable demand may not restrain a defendant also from setting up an inequitable defence. A much more plausible reason is that suggested by Mr. Justice Story, that, where the parties are all already before the court, the Chancellor may as well do justice to them at once by a direct decree.

But, whatever be the foundation of the doctrine of assessment elsewhere, it is certain that we are indebted to it exclusively for our jurisdiction in matters of subrogation. An assignment may be unnecessary where the parties are before a court with chancery powers; but the scantiness of our equitable apparatus sometimes drives us to curious shifts. The necessity we are under of administering equity through the medium of common-law forms compels us, in cases like the present, to arrive at justice indirectly, by the instrumentality of an imaginary assignment of the security, which enables the surety to apply it, by direction of the court, in a way to cast the burden on those who ought to bear it. Our leading case is Kuhn v. North, 10 Serg. & R. 399, in which it was held that, though payment by a surety with intent to discharge the security extinguishes it in equity as well as at law, yet that, where the amount of the debt is advanced to procure the control of it, equity keeps it afoot to answer the intent of the advancement—a distinction whose value, as the surety can have no motive or intent in a case of involuntary payment, is not very easily appreciated. The general principle, however, has been reasserted in Fleming v. Beaver, 2 Rawle, 132, 19 Am. Dec. 629, Burns v. Huntingdon Bank, 1 Pen. & W. 395, and Mehaffy v. Share, 2 Pen. & W. 378. In our own state, therefore, the question must be considered as at rest.

Now it is clear, on the proofs in the case under consideration, that the note was discounted for the drawer to make up the amount of stock he had agreed to bring into the partnership, and that, though the proceeds of it were, in the first instance, received by the surety who

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claims to be substituted, yet that he charged himself, at the drawer's request, with the amount to which the drawer's stock account had fallen short. We have then the ordinary case of payment by a surety, and the court below properly directed him to be substituted for the creditor.

Order of subrogation affirmed.

TOWNSEND v. WHITNEY.

(Court of Appeals of New York, 1878. 75 N. Y. 425.)

Appeal from an order of the General Term of the Supreme Court, in the Third Judicial Department, reversing an order made by the surrogate of Ulster county denying an application on the part of plaintiff for an attachment against defendant for failure to pay over moneys as required by a decree of said surrogate. Reported below, 15 Hun, 93.

The facts appear sufficiently in the opinion.[11]

EARL, J. The defendant and Solomon A. Ferris were appointed by the surrogate of Ulster county administrators of the estate of John J. Ferris, deceased; and upon such appointment they gave the bond required by law, signed by them and by William H. Townsend and another, who is now dead, as sureties. Subsequently the administrators accounted before the surrogate, and he made a decree by which he ordered them to pay certain sums to Mrs. Love, Mrs. Ferris, and Mrs. Elting respectively as their distributive shares of the estate. These sums not having been paid, subsequently a certificate of the decree was obtained from the surrogate, and the decree was docketed in the clerk's office of Ulster county, under the provisions of chapter 460 of the Laws of 1837, as amended by chapter 104 of the Laws of 1844. The decree did not become merged by docketing the same. The docket did not make it a judgment, but simply made it a lien upon real estate for the amounts shown in the certificate; and executions could thereafter be issued to enforce the same, as upon judgments recovered in the County Court. After the decree was thus docketed, the persons in whose favor it was docketed had two remedies to enforce payment of the money due them—one by attachment against the administrators in the Surrogate's Court, and another by executions based upon the docket. The two remedies are not inconsistent, but concurrent or cumulative; and they may both be pursued until the decree has been complied with.

Executions were issued and returned unsatisfied, and then, upon application, the surrogate assigned the bond to the persons in whose

[11] The arguments of counsel are omitted.
The full title of the case is Theophelia G. Townsend, Respondent, v. Oliver B. Whitney, Appellant.

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favor the decree was made, for the purpose of prosecution by them. Section 65, c. 460, of the Laws of 1837.

Mrs. Love, Mrs. Ferris, and Mrs. Elting then commenced actions upon the bond against the administrators and Townsend, the surviving surety, and recovered each a judgment for the amount due her. Then Townsend, the surety, with his own money paid the amounts of the judgments to Mrs. Love, Mrs. Ferris, and Mrs. Elting, and procured them to assign the judgments and also the decree of the surrogate to the present respondent, his wife. This he did for the purpose of enabling her to proceed by attachment against the administrators to compel payment by them. She then applied to the surrogate for an attachment against the administrators for not paying the money as directed by the decree, and he denied the remedy, on the ground that the payment of the judgments by the surety, in the manner above mentioned, discharged both the decree and the judgments. But his decision was upon appeal reversed by the Supreme Court, and the administrator, Whitney, has appealed to this court.

The appellant now claims that the decree was merged in the judgments subsequently obtained upon the bond, and hence that an attachment to enforce it is unauthorized. This claim is not well founded. The decree was the principal debt, and the bond was a collateral security for such debt. The judgments were not recovered upon the decree, but upon the bond. It is too clear to need argument that a judgment upon a collateral security does not merge the principal debt, and does not suspend, so long as it remains unpaid, any remedy upon the principal debt. Day v. Leal, 14 Johns. 405; Baker v. Martin, 3 Barb. 634; Supervisors of Livingston Co. v. White, 30 Barb. 72. The parties entitled to payment under the decree had the right to pursue their remedies upon the decree, and also upon the bond, until they obtained satisfaction.

It is also contended, on behalf of the appellant, that the payment of the judgments by Townsend, in the manner above mentioned, satisfied both the decree and the judgments. It is probably true that the case is not altered by the assignment to Mrs. Townsend. She had no separate estate, and no means. Her husband furnished the money to pay the judgments, and the assignments to her were merely formal, to enable him, in her name, to enforce the decree. This case may therefore be treated as if the surety had paid the judgments, and then taken an assignment of them, and also of the decree, for the purpose of enforcing them against the principal debtors. 1 Story's Eq. Jur. § 499, b.

Where one of two joint debtors, both of whom are principals, pays a joint judgment, the judgment becomes extinguished, whatever may have been the intention of the parties to the transaction; and it is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. Har-

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beck v. Vanderbilt, 20 N. Y. 395. The remedy of the party thus paying is by an action against his codebtor for contribution.

But a different rule prevails where one of the joint judgment debtors is a surety upon the obligation put into judgment. Under the civil law, a surety paying the joint obligation is entitled not only to be subrogated to all the securities which the creditor holds for the payment of the debt, but he is entitled to be substituted, as to the very debt itself, to the creditor, by way of cession or assignment. It treats the transaction between the surety and the creditor, according to the presumed intention of the parties, to be not so much a payment, as a sale of the debt. 1 Story's Eq. Jur. § 500; 1 Domat, bk. 3, tit. 1, § 6, art. 1. But this broad rule of equity has not been fully adopted in England. There it seems to be the general rule that a payment of a joint obligation by a surety extinguishes the obligation both at law and in equity, and that it cannot be kept on foot for his benefit. But a surety thus paying is entitled to all the collateral securities held by the creditor for the payment of the debt. Copis v. Middleton, 1 Turn. & Russ. 224; Reed v. Norris, 2 Mylne & Craig, 361; Hodgson v. Shaw, 3 Mylne & Keene, 183. It is there held that the surety cannot be subrogated to the very obligation paid, because it does not survive payment, and there is nothing left to which he can be subrogated, and that he can be subrogated only as to such securities and remedies as survive the payment of the principal obligation. But it has not always been easy to define the cases in which subrogation could be had, and the English authorities are not at all consistent. It would be useless to criticise and attempt to reconcile or distinguish them.

The general American doctrine in favor of sureties is more liberal than that of the English courts, and I will refer to only a few cases decided in this state. In Cuyler v. Ensworth, 6 Paige, 32, four persons became jointly liable in the official bond of a county treasurer, who afterwards misapplied the funds of the county and died insolvent, and a judgment was thereupon recovered against the four sureties in the bond, and three of them afterwards paid the whole amount of the debt and costs, and an execution was issued upon the judgment for their benefit, on which the sheriff was directed to levy one-fourth of the amount of the judgment of the property of their co-surety, which execution was subsequently returned unsatisfied; and it was held that the three sureties, who had paid the whole debt and costs, could file a creditors' bill in their own names against their co-surety to obtain satisfaction of his ratable proportion of the judgment out of his equitable interests and choses in action which could not be reached by the execution at law. The broad doctrine is laid down that "the surety, by the mere payment of the debt, and without any actual assignment from the creditor, is, in equity, subrogated to all the rights and remedies of the creditor, for the recovery of his debt against the principal debtor or his property, or against the co-sureties or their

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property, to the extent of what they are equitably bound to contribute." Although the judgment was paid, it was held that the sureties who paid it were subrogated to all the remedies which the creditor had to enforce payment; and yet, under most of the English authorities, the judgment by such payment would have been held to be extinguished, so that there could have been no subrogation in reference thereto. In Speiglemyer v. Crawford, 6 Paige, 254, there was a creditors' bill prosecuted on behalf of a surety against the principal, founded upon a decree against the principal and surety for the payment of money; and the Chancellor said: "If the surety had paid the decree, he would, in equity, have been entitled to an assignment of all the rights and remedies of the complainant to compel payment and satisfaction of the debt and costs by the principal debtor. He would also, in that case, have been permitted to file a creditors' bill against the defendant in his own name, founded on such original decree, to obtain satisfaction out of her property which could not be reached by the execution on such decree."

If A. executes to B. a bond for the payment of money which is guaranteed by C., and at the same time executes a mortgage upon real estate to secure the payment of the same sum, and C. is compelled to pay the bond, he is entitled to be subrogated to the mortgage and enforce it for his indemnity (Mathews v. Aikin, 1 N. Y. 595); and yet the payment of the bond also pays the mortgage, and the mortgage in the hands of the mortgagee is absolutely as much extinguished as the bond. In equity, however, the mortgage is kept in life, just as it was before payment, for the benefit of the surety. In England, the surety, in such a case, is allowed to be subrogated to the mortgage, on the theory that the mortgagee's estate was not divested by payment, and could only be divested by a reconveyance to the mortgagor, and hence that the estate survived payment, and was not extinguished thereby. Copis v. Middleton, supra. Here subrogation is not upon that theory, as the mortgagee takes no estate in the land, and the lien of the mortgage becomes extinguished by payment. But the subrogation is based upon the broad doctrine of equity, that the surety upon payment is entitled to all the remedies and securities which the creditor held before payment. In Lewis v. Palmer, 28 N. Y. 271, Wright, J., laid down the rule thus broadly: "It is a well-settled principle that a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and to all the means which the creditor possessed to enforce payment against the principal debtor." In Clason v. Morris, 10 Johns. 525, Spencer, J., said: "That a surety, who pays a debt for his principal, has a right to be put in the place of the creditor, and to avail himself of every means the creditor had to enforce payment against the principal debtor, is a principle which I had supposed incontestable." In Goodyear v. Watson, 14 Barb. 481, the rule of the civil law was adopted, and a very learned court held that where a

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surety paid a judgment recovered against himself and the principal debtor, and took an assignment thereof for his own benefit, such payment did not extinguish the judgment, but that, after the death of the principal, payment of it, according to its priority of date, out of the assets of the principal debtor, might be decreed by the surrogate; and a similar decision was made in the case of Alden v. Clark, 11 How. Prac. 209.

These citations are sufficient to show what the rule is in this state, and I will now proceed to apply it to this case.

It is not necessary to hold, in this case, as many authorities in this country, as well as the civil law, would warrant, that the judgments paid by Townsend survived, so as to be the subject of subrogation. If the judgments were completely extinguished by the payment, it is because they were joint judgments against the principals and the surety. But the creditors had two remedies—one upon the judgments, and another upon the decree which could be enforced by attachments; and these two may be treated as securities for the payment of the same debt. The surety was not a party to the decree, and that could not be enforced against him. The creditors had independent remedies upon the decree; and, when the surety paid the judgments, he took the place of the creditors as to such decree, and was subrogated thereto. It matters not that payment of the judgments also paid the decree. Payment of a bond also discharges the mortgage collateral thereto, and yet, as shown above, the mortgage, for the purpose of subrogation, survives.

I am, therefore, of opinion that upon the payment made by the surety he became subrogated to this decree, and he had the right to have the same assigned to himself or to some other person designated by him.

It is also said that the assignee, Mrs. Townsend, cannot enforce this decree in her own name by attachment. This is a mere technical objection, and not one of substance. The surety could, if necessary, have used the names of the original creditors in the enforcement of the decree. Such is always the right of a surety in such cases, if his interests require it. But by this assignment the whole legal title to the decree was vested in the assignee. She is entitled to the moneys due thereon. The duty, which was before due from the administrators to the original creditors, is now due to her, to the same extent. She has become a party to the decree, and can invoke every remedy for its enforcement. Every sale of a judgment, decree, or other obligation carries with it every remedy which the law gives the seller to enforce payment. The remedy attaches to and inheres in the obligation, and does not pertain to the person of the owner.

Some objection is made to the regularity of the proceeding before the surrogate. It is sufficient to say that no such objection was made before the surrogate, and that by the order of the Supreme Court the proceeding is remitted to the surrogate; and if he did not before,

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he can, upon the further hearing of the matter, conform to the statute. It is therefore not necessary to examine this objection.

The order of the Supreme Court must be affirmed, with costs. All concur.

Order affirmed.[12]

[12] If the surety pays a judgment rendered against the principal alone, the right of the surety to be subrogated to the creditor in the judgment has never been denied. Cottrell's Appeal, 23 Pa. 294 (1854); Enders v. Brune, 4 Rand. (Va.) 438 (1826); Hill v. Manser, 11 Grat. (Va.) 522 (1854).

At common law, suretyship frequently assumed the form of a joint obligation executed by the principal and surety, and for many years in the law of England the legal incidents of that species of contract were paramount to the equity of subrogation. Thus payment by one of two judgment debtors who were bound jointly (or jointly and severally) extinguished the judgment and technically left nothing of the judgment to be assigned to the surety for subrogation. In England until recent times equity thus followed the law (Dowbiggen v. Bourne, 2 Y. & C. 462 [1837], s. c. A. 376; Preslar v. Stallworth, 37 Ala. 402 [1861]), until a provision of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, § 5) provided as follows: "V. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action, or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

In accord with the principal case: Smith v. National Surety Co., 28 Misc. Rep. 628, 59 N. Y. Supp. 789 (1899); Ferguson's Adm'r v. Carson's Adm'r, 86 Mo. 673 (1885); Jennings v. Hare, 104 Pa. 489 (1883), obiter; Dodd v. Wilson, 4 Del. Ch. 399 (1872), the surety in a bond taken in satisfaction of a joint judgment against the surety and others being subrogated to the creditor's rights under the original judgment after payment of the second bond; Vanderveer v. Ware, 65 Ala. 606 (1880).

Many other cases are collected in Sheldon on Subrogation (2d Ed. 1893) pp. 206–219; also in 24 A. & E. Ency. of Law (1st Ed.) p. 234, title "Subrogation."

Statutory provisions, giving the surety the benefit of joint judgments paid by him, have been enacted to cure the hardship of the common law. Harris v. Wynne, 4 Ga. 521 (1848); Johnson v. Amana Lodge, 92 Ind. 150 (1883); McClure v. Lucas, 2 Ind. App. 32, 28 N. E. 153 (1891); Dibrell v. Dandridge, 51 Miss. 55 (1875); Duffield v. Cooper, 87 Pa. 443 (1879).

In many states of the Union statutory provisions keep the judgment alive after payment and give the paying surety the benefit of it for subrogation. See Stimson's American Statute Law, p. 614, § 5121 (1886), for references to local legislation.

Some American states have abolished by statute the priority of judgments on specialties over judgments on simple contracts. See 8 A. & E. Ency. of Law (2d Ed.) pp. 1034, 1041, 1049.

"A striking difference has existed between the course of legislation on the different sides of the Atlantic, with respect to the liability of estates of de-

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PEIRCE et al. v. GARRETT et al.

(Appellate Court of Illinois, Second District, May Term, 1896. 65 Ill. App. 682.)

Mr. Justice HARKER delivered the opinion of the court.[18]

This is an appeal from an order of the circuit court sustaining a demurrer to a bill in equity presented by appellants and dismissing it for want of equity at their costs.

The bill shows that on the 20th of July, 1893, John M. Boyer, being indebted to the Third National Bank of Bloomington, Illinois, with S. S. Porter, G. A. Griggs, John Niccolls and E. A. Vencill, as sureties for the Home Nursery Company, in the sum of $8,400, as evidenced by a promissory note executed by them, June 12, 1893, executed and delivered to the bank a mortgage upon 185 acres of land in Whiteside county for the purpose of securing its payment; that the mortgage was given subject to a prior one for $2,000 to the Anthony Loan & Trust Company; that Griggs, Niccolls and Vencill are insolvent; that on January 22, 1894, judgment was entered upon the note for $9,110.66; that Porter paid the judgment in full; that Porter assigned his right to subrogation as co-surety to complainants, and procured the bank to assign the judgment and mortgages to complainants for a consideration of $2,000; and that Boyer, on the 9th of June, 1894, and long after the mortgage to the bank was placed upon record, conveyed the land to J. S. Garrett. The bill asks for a decree in favor of complainants to the extent of the rights of Porter and the bank, for an accounting to ascertain what is due complainants, and for an order of sale of the mortgaged premises, all subject to the rights of the Anthony Loan & Trust Company.

The demurrer is by Garrett and wife.

We entertain no doubt upon the proposition that Porter was subrogated to all the security of the bank against Boyer. The doctrine is well established that a surety who pays the debt of his principal will be subrogated to all the securities and equities held by the creditors against the principal. 1 Story's Equity Jurisprudence, § 499; 2 Brandt on Suretyship, 479; Phares v. Barbour, 49 Ill. 370; Rice et al. v. Rice et al., 108 Ill. 199; Lochenmeyer v. Fogarty, 112 Ill. 572.

So firmly committed is our Supreme Court to that doctrine that it has been held the creditor cannot release the security which it holds,

cedents for the payment of their debts, and although the rules in the different states must necessarily be local in their application, yet it may, in general, be said that in this country lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract, and that in the two latter cases, although they create no lien during the debtor's life, yet by his death their quality is changed, and they become liens on the real estate, which descends to the heir, or passes to the devisee, subject to the payment of the debts of the ancestor, according to the local laws of the state." Smith on Contracts (7th Am. Ed.) p. 33, note 1, by Rawle.

[18] The arguments of counsel are omitted.

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to the prejudice of the surety. City National Bank of Ottawa et al. v. Dudgeon et al., 65 Ill. 11.

Upon the same principle a surety who pays the debt for which he and a co-surety are liable will be subrogated to the rights of the creditor against the co-surety upon securities given by him to the extent of his right to compel contribution from the co-surety.

The fact that the debt was changed to a judgment before it was paid does not affect Porter's right of subrogation.

Where a mortgage is given to secure a debt, and a debt becomes merged in a judgment, the mortgage stands as security for the judgment. Wayman et ux. v. Cochrane, 35 Ill. 152; Darst v. Bates et al., 95 Ill. 493. Satisfaction of the judgment by a surety paying it would undoubtedly entitle such surety to an action on the mortgage.

The most serious question in the case is whether Porter's right of subrogation is assignable. Whether the collateral security to which a surety becomes subrogated by reason of paying the debts can be assigned, so as to enable the assignee to maintain a suit, is a question which has never been presented to the courts of last resort in this state, so far as we are advised. It has been so held in Indiana. Manford v. Firth, 68 Ind. 83; Frank v. Traylor, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115. In Harris on Subrogation, § 199, the author, after stating that the surety is entitled to subrogation in a court of equity, whether there has been an actual assignment of the collateral to him or not, says:

"Not only is this true, but the surety so paying the debt of his principal, and thus acquiring the right of subrogation, may assign over to any one his demand and equitable claim against the principal, and his assigns will be subrogated to the rights of the creditor, and may take his place, with all the securities, rights, remedies, privileges and priorities."

To us it seems consonant with reason that if the satisfaction of the judgment by Porter left the mortgage still alive, with the right in him to foreclose to the extent of his right to compel Boyer to then contribute, Porter could assign to appellants for a valuable consideration, and they would thereby be subrogated to all the rights of the Third National Bank and Porter in the mortgage.

Garrett has no standing in a court of equity by which a foreclosure can be defeated. He bought the land for one dollar, subject to incumbrances.

The court erred in sustaining the demurrer interposed by him and his wife.

The decree will be reversed, and the cause remanded, with directions to the circuit court to overrule the demurrer.

CRABTREE, J., took no part.[14]

[14] Accord, on the question of after-acquired collateral: Hughes v. Ranken, 7 Phila. (Pa.) 175 (1869), Hare, P. J.

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FIRST NAT. BANK v. DAVIS et al.

(Kansas City Court of Appeals, Missouri, 1901. 87 Mo. App. 242.)

SMITH, P. J.[15] Defendants, John Davis as principal and Patrick Davis as surety, executed their promissory note to the plaintiff bank for $1,152, due 12 months after date, and contemporaneously with the execution of said note the defendant John Davis executed to his co-defendant and surety Patrick Davis a deed of trust on his land to secure the latter "against any loss he may sustain by reason of his said suretyship." The value of the security so given was in excess of the amount of the debt. When the debt fell due, neither of the defendants were in condition to pay it. The time for payment was extended, but whether or not with the consent of the surety the evidence is sharply in conflict. Both of the defendants, after the giving of the note and mortgage, became insolvent.

The object of this suit was to recover judgment against the principal debtor on the said promissory note, and to have said deed of trust declared a lien on the land therein described as of the date thereof, for the purpose of securing to the said creditor the payment of the amount adjudged in said promissory note, to foreclose the equity of redemption of the surety and his wife, and that the same be sold clear of the right of the said surety under said deed of trust for the purpose of satisfying the said judgment, etc. The question here for decision is whether or not the creditor can have recourse in equity to satisfy his debt to the mortgage security taken by the surety from the debtor for his indemnity.

The property of the principal debtor belongs to the creditor, which, under certain circumstances, the latter may subject in the hands of the surety to the satisfaction of his debt. The holder of such indemnity is a trustee for the creditor. Hampton v. Phipps, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719; Leggett v. McClelland, 39 Ohio St. 624; McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849. If the debtor gives his surety indemnity, the creditor may avail himself of it by subrogation, even though in the first instance it was unknown to him. Leggett v. McClelland, supra; Hopewell v. Bank, 10 Leigh (Va.) 206; McCollum v. Hinckley, 9 Vt. 143. The rule is well settled that, where a security is given by a principal to his surety, it operates eo instanti as a security to the creditor for the payment of his debt. The security so given is a trust fund, and is regarded in equity as a trust fund, for the payment of the debt. Taylor v. Bank, 87 Ky. 398, 9 S. W. 240. The security is for the debt, as well as for the ultimate protection of the surety. It is, as has been stated, at once clothed with a trust character and the creditor immediately acquires a right and interest in it that cannot be defeated by the surety; and, as said in substance by Judge Napton in Logan v. Mitch-

[15] The arguments of counsel are omitted.

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ell, 67 Mo. 524: The surety cannot alter or impair the creditor's right, and if the security was originally taken, not only to indemnify the surety, but to secure the creditor, any action of the former would be powerless to affect the latter. And in Bank v. Rich [106 Mich. 319, 64 N. W. 339], it is said that, where a surety for the payment of a debt received security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal did not act upon the credit of such security in the first instance.

But suppose it to be true, as the debtor here contends, that the creditor did extend or enlarge the time of payment of the debt; did that have the effect to discharge the surety and withdraw the security from the operation of the trust in which it had been placed? Where a surety, as here, is fully indemnified in property, he is estopped to set up against the creditor the defense that the time of payment has been extended in favor of the principal without his consent, because such surety is the virtual principal, and ought to be bound by every enlargement of the time of payment quite as much, or perhaps more than the principal debtor. A surety who has received an indemnity equal to the debt for which he is bound, and which he may, as here, convert into money, stands in about the same position as a surety who has received of the principal an amount in money. In such case the surety is a principal, and cannot be permitted to claim the privilege of a strict surety without indemnity. Brandt on Suretyship, § 349; McDougall v. Walling, supra; Smith v. Steele, 25 Vt. 427, 60 Am. Dec. 376; Chilton v. Robbins, 4 Ala. 223, 37 Am. Dec. 741; Moore v. Paine, 12 Wend. (N. Y.) 123. And it is certainly clear that he can make no such defense while he holds on to the security. This is not a case where a stranger has chosen to bestow upon a surety a benefit and a preference from considerations personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. Of course, in such case the creditor could not, upon any ground of priority in interest, claim any share or interest in the benefit of such benevolence.

If the surety is, as we have stated, estopped to claim a release on the ground that there has been an extension of the time of payment of the debt because in equity he occupies the attitude of a principal himself, it inevitably follows that his co-principal, the original debtor, cannot be heard to claim any such release of his own property from the operation of the trust in which he had placed it to secure the payment of his own debt. He stands in the situation of one who has given a mortgage to secure his own debt, and cannot by any act of his deprive the mortgagee of the benefit of the mortgage security until the debt is paid. The status of the parties at the time the suit was commenced was the same that it was when the mortgage, or, which is the same thing, the deed of trust, was given. The extension of the time of payment did not alter or change the rights of the parties. The se-

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curity was afterwards, as before, bound in equity for the payment of the creditor's debt. The surety, by neglecting to convert the security and pay the debt, cannot thereby defeat the right of the creditor to have it subjected to the payment of his debt, for it was a security provided as well for him as for the surety. It seems to us that a bare statement of the facts in this case are sufficient to show that upon the principles of natural justice and equity the property of the debtor, which he placed in the hands of the trustee surety as an indemnity, ought to be subject in the hands of the trustee surety to the satisfaction of the debt of the creditor.

Accordingly, we think that the decree which was for the plaintiff in conformity to the prayer of his petition, to which allusion has been made, should be affirmed; and it is accordingly so ordered. All concur.[16]

SHINN v. BUDD.

(Court of Chancery of New Jersey, 1862. 14 N. J. Eq. 234.)

THE CHANCELLOR. On the 19th of July, 1852, Charles Cotton, being seised in fee of a house and lot in Southampton, mortgaged the same to secure the payment of $225 to Isaac Hilliard. The mortgage was subsequently assigned to Andrew Fort.

On the 1st of March, 1856, Cotton died, and letters of administration upon his estate were granted to Shinn, the complainant. The

[16] If the surety, by reason of the statute of frauds, has a valid personal defense, he may, nevertheless, be charged in an action by the creditor to the extent of the value of the collateral received from the principal. Jack v. Morrison, 48 Pa. 113 (1864).

In numerous cases it is held that, if collateral has been given to the surety to secure the debt, the creditor may be subrogated to the security. Curtis v. Tyler, 9 Paige (N. Y.) 432 (1842); Harlan County v. Whitney, 65 Neb. 105, 90 N. W. 993, 101 Am. St. Rep. 610 (1902); Chambers v. Prewitt, 71 Ill. App. 119 (1896).

But this rule is limited, when operative at all, to the cases where the security is given by the debtor, and the creditor's subrogation does not extend to cases where the security is given by one co-surety to another or by a third person to a surety. See Hampton v. Phipps, 108 U. S. 260, 2 Sup. Ct. 622, 27 L. Ed. 719 (1883). And see Taylor v. Farmers' Bank, 87 Ky. 398, 9 S. W. 240 (1888); post, p. 321.

On the general question of subrogation in favor of creditor in respect to securities held by the surety, see note, 10 H. L. R. 64. See, generally, on this question, the paper by Mr. William Williams in 1 H. L. R. 326. On subrogation of surety of corporation to right of creditor to enforce individual liability of stockholders, see note, 15 H. L. R. 323.

Contra: Osborn v. Noble, 46 Miss. 449 (1872); Pool v. Doster, 59 Miss. 258 (1881); Dyer v. Jacoway, 76 Ark. 171, 88 S. W. 901 (1905).

The early English case Maure v. Harrison, as abridged in Equity Cases Abridgment, 93, pl. 5, is said to be inadequately reported, and it is repudiated as an authority in In re Walker, L. R. 1 Ch. 621 (1892). Also, in accord, Wilding v. Richards, 1 Coll. 655 (1855).

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personal estate proving insufficient to pay the debts, the administrator obtained an order of the orphans' court to sell the real estate of the decedent for the payment of debts. In pursuance of this order, the mortgaged premises were advertised for sale by the administrator, and were struck off and sold to John Johnson for $365.52. So far as appears by the evidence, neither the advertisement, the conditions of sale, the report of sale by the administrator, nor the decree of confirmation contain any reference whatever to the encumbrance upon the premises. On the 13th of November, 1856, a deed, in pursuance of the sale, was executed by the administrator to the purchaser. On the 23d of March, 1857, the title became vested in Thomas Kealy. Kealy died on the 20th of June, 1858. The land was sold, under an order of the orphans' court, by his administratrix, for the payment of debts, and on the 21st of May, 1860, the title became vested in Budd, the defendant.

On the 30th of March, 1857, the complainant paid to Andrew Fort, the assignee of the mortgage, $112, the balance of principal and interest remaining due and unpaid upon the mortgage debt, and took his receipt therefor upon the bond. The bill is filed to enforce the incumbrance of the mortgage against the land in the hands of the defendant. The complainant asks to be substituted in the place of the assignee of the mortgage, and to be subrogated to his rights. The ground upon which the relief is asked is that the purchaser at the administrator's sale took his title subject to the mortgage, that the sum due upon the mortgage was deducted from the amount of the purchase money, and that the mortgage debt was paid by the complainant, not as administrator, out of funds belonging to the estate of Cotton, but out of his own funds.

The complainant's case, assuming it to be fully sustained by evidence, is briefly this: As administrator of the estate of Cotton, he sold the real estate of the intestate, by order of the orphans' court, for the payment of debts. The property was sold for $365.52, the consideration expressed in the deed of conveyance, this constituting the entire value of the land clear of encumbrances. The amount due upon the mortgage, $112, was not paid by the purchaser. After the sale, the mortgage debt was paid by the complainant to the holder of the mortgage, who indorsed upon the bond a receipt in full of the debt. There was no assignment of the bond and mortgage. The estate of Cotton was settled as if the purchase money had been paid in full by the purchaser. It was in fact advanced by the complainant out of his own funds. The mortgage remains in his hands uncanceled of record. This is stating the case most favorably for the complainant. He now comes into court seeking to enforce the mortgage against those claiming under his own grantee. He does not claim to hold the mortgage by assignment; but he asks, by subrogation, to be substituted in the place of the mortgagee, and to succeed to his rights.

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Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit, who being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Napoleon, book 3, tit. 3, art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier on Oblig., part 3, c. 1, art. 6, § 2.

"We are ignorant," say the Supreme Court of Louisiana, "of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs, not to all who pay a debt, but only to him who, being bound for it, discharges it." Nolte & Co. v. Their Creditors, 8 Mart. (N. S.) 366; Curtis v. Kitchen, 8 Mart. (O. S.) 706; Cox v. Baldwin, 1 La. 401.

The principle of legal substitution, as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits.

In Bank of the United States v. Winston's Executors, 2 Brock. 254, Fed. Cas. No. 944, Chief Justice Marshall said: "If a security not assignable be discharged by a surety whom it binds, equity keeps it in force in his favor, and puts such surety in the place of the original creditor. But I think there is no case in which this has been done in favor of a person, not bound by the original security, who discharges the debt as a volunteer."

In Gadsden v. Brown, 1 Speers, Eq. (S. C.) 41, Johnson, Chancellor, says: "The doctrine of subrogation is a pure unmixed equity, and from its very nature could not have been intended for the relief of those who were in a condition and at liberty to elect whether they would or would not be bound, and so far as I have been enabled to learn its history it never has been so applied. It has been directed exclusively to the relief of those who were already bound, and who could not but choose to abide the penalty. I have seen no case in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."

In Sandford v. McLean, 3 Paige (N. Y.) 122, 23 Am. Dec. 773, Chancellor Walworth states the principle with great clearness: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course without any agreement to that effect. In other cases, the demand of a creditor, which is paid with the money of a third person, and without any agreement that the

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security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

The same doctrine will be found to be maintained in numerous other cases in the American courts. Hays v. Ward, 4 Johns. Ch. (N. Y.) 130, 8 Am. Dec. 554; Banta v. Garmo, 1 Sandf. Ch. (N. Y.) 384; Wilkes v. Harper, 1 N. Y. 586; Swan v. Patterson, 7 Md. 164. See, also, Copis v. Middleton, 1 Turner & Rus. 224; Hodgson v. Shaw, 3 Mylne & K. 183; Williams v. Owen, 12 Simons, 597; Bowker v. Bull, 1 Simons (N. S.) 29.

The complainant is clearly not in a position to claim the benefit of the principle which he invokes for his relief. He had no interest in the land subject to the mortgage for the protection of which it was necessary that he should pay the mortgage debt. He was under no obligation to pay it, as surety or otherwise, out of his own funds; on the contrary, it was his duty, as administrator of Cotton, to pay the debt out of that estate. He so understood his duty; for in the final settlement of his accounts as administrator, he charges himself with the entire proceeds of the sale, and claims credit for the payment of the mortgage debt out of the estate. If he chose to advance the mortgage debt out of his own funds for the convenience of the purchaser, he was in a situation to require a new mortgage, or such other security as he saw fit, for his own protection. Having neglected to do so, he has no claim to protection in equity by being subrogated to the rights of the mortgagee.

The fact that the mortgage has not been satisfied of record will not alter the case. The evidence shows that the mortgage debt is extinguished. The holder of the mortgage neither assigned nor agreed to assign the security. Upon the receipt of the money, he gave the administrator a receipt in full for the debt. But if the fact were otherwise, if the administrator held the bond and mortgage in his own hands, undischarged and unassigned, after the settlement of the estate of the intestate, this court would not interfere for his relief. It would be eminently dangerous to permit an administrator, after the settlement of an estate, to set up an uncanceled mortgage in his hands which it was his duty to have discharged, and which by his final settlement he alleges was discharged, as a subsisting incumbrance upon the title of the purchaser of the mortgaged premises, or those claiming under him.

Nor is the case aided by the fact that the defendant was apprised at the time of his purchase of the claim of the complainant. Notice of an equitable lien will operate to charge the estate in the hands of the purchaser, but no notice will serve to render operative as an incumbrance a claim in itself inequitable.

With this view of the principle by which the case must be controlled and decided, it is unnecessary to determine the disputed questions of fact in the case. The facts have been assumed to be in accordance

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with the allegations of the complainant's bill. Whether they have been established in evidence is in no wise material to the rights of the parties.

The bill must be dismissed, with costs.[17]

JONES v. DAVIDS.

(Court of Chancery, 1828. 4 Russ. 277.)

The plaintiff filed his bill, on behalf of himself and all other the specialty creditors of the testator, against the heir and the executors.

For the defendants it was objected that the plaintiff was not a specialty creditor, and therefore could not sustain such a bill.

The plaintiff had joined as surety with the testator in a joint and several bond, and, after the death of the testator, had paid the amount of the bond to the obligee, taking an assignment of the bond.

Mr. Griffith Richards, for the heir of the testator, relied upon Copis v. Middleton, 1 Turn. & Russ. 224, and cited Gammon v. Stone, 1 Ves. Sr. 339, and Woffington v. Sparks, 2 Ves. Sr. 569. The bond, he argued, was satisfied by payment, and the assignment of it to one of the co-obligors was an idle formality; for the assignment of an instrument, which had ceased to have any legal force, could not confer any legal rights.

Mr. Sugden and Mr. Wilson, for the plaintiff.

This case is distinguished from Copis v. Middleton by the circumstance that here the bond has been assigned to the surety, and by virtue of that assignment he must have against the estate of the principal obligor all the remedies which the obligee might have had. Suppose the surety had employed a third person to pay the amount of the bond to the obligee, and to take an assignment of it as trustee for him, the bond in the hands of that trustee would have been a valid security; and the surety, through the medium of his trustee, would have been a specialty creditor on the estate of the co-obligor. Can it, in equity, make any difference as to the nature or degree of his demand whether the bond is assigned to him or to a trustee for him?

THE MASTER OF THE ROLLS. In Copis v. Middleton the surety, Martin, had also taken an assignment of the bond; and that circumstance was held not to make his case different from the case of the other surety who had taken no assignment. After the assignment, the action on the bond must be brought in the name of the obligee; and payment by the surety would be an answer to the demand.

The bill must be dismissed; but I will not, in this case, give the

[17] Accord: Ætna Life Insurance Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537 (1888); Webster & Goldsmith's Appeal, 86 Pa. 409 (1878).

On the question whether subrogation exists in favor of a surety unknown to the debtor against the debtor's other sureties, see note, 17 H. L. R. 577.

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defendants the costs of the suit, because they ought to have demurred, and thus have saved to both parties all further expense. Hill v. Reardon, 2 Sim. & Stu. 439.[18]

HILL v. KELLY.

(Court of Chancery, Ireland, 1794. Ridg. L. & S. 265.)

The plaintiff brought his bill to compel the defendant to assign to him a bond, upon which judgment had been entered. He stated that William Blanc, having borrowed a sum of money from the defendant, prevailed upon the plaintiff to join him in a bond to the defendant, which bond was accordingly executed, and separate judgments were afterwards entered by virtue of a warrant of attorney for that purpose. The defendant afterwards sued out execution against the plaintiff alone, and refused to assign the bond and judgment, upon being tendered the amount of the debt and costs.

The defendant in her answer insisted that the money was lent to the plaintiff himself, and not to Blanc, who joined in the bond at the plaintiff's request, and merely as surety; and she offered to enter satisfaction upon the judgments when paid her demand.

[18] But now by St. 32 & 33 Vict. c. 46 (Hinde Palmer's Act, 1869), after reciting that "it is expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons," it is enacted by section 1 that "in the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided, always, that this act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt." Williams on Executors (10th Ed.) p. 771.

St. 19 & 20 Victoria, c. 97, § 5: "Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt, or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made, and loss sustained by the person who shall have so paid such debt, or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided, always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

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Witnesses were examined, and there was contradictory swearing as to the person, who was the real debtor. The cause came on to be heard in Trin. 1793, when M. Smith, and Espinasse contended that the plaintiff was entitled to a decree; but, if the court had any doubt upon the evidence, an issue might be directed to ascertain the fact.[19]

LORD CHANCELLOR thought the conduct of the defendant was not entitled to favor in a court of equity. Her object in preventing the judgment standing out in the hands of the plaintiff against Blanc was an apprehension that it might defeat securities which she had taken from Blanc, subsequent to the judgment, the consideration for which securities appeared from the evidence to be composed of old debts, with arrears of interest consolidated together, and made to bear interest. Those securities, therefore, going to establish a claim of compound interest, were not to be preferred, and the circumstances of Blanc might be an additional reason with the defendant for resorting to the plaintiff. But, as there was contradictory evidence respecting the fact who was the real debtor, it was necessary to have that ascertained by a jury. The cases cited related merely to bonds, and did not apply to the case of judgments.

An issue was directed to try to which of the two persons, Hill or Blanc, the money was really lent by the defendant. It was accordingly tried at the last assizes for Maryborough, when the jury found for the plaintiff.

Upon this finding the cause came now upon a final hearing, when Espinasse and A. Moore prayed a decree for the plaintiff.

Sankey, for the defendant, contended that, notwithstanding the verdict, the plaintiff was not entitled to a decree. He went over the cases formerly cited, and added that there was an evident collusion between the plaintiff and Blanc to the injury of the defendant; for otherwise the assignment of the judgment would not serve the plaintiff, for, being a joint security with Blanc, a payment by one was a discharge of both, and might be so pleaded by Blanc. Equity therefore ought not to assist this collusion, nor deprive a bona fide creditor of a legal right.

LORD CHANCELLOR. The cases now cited were mentioned upon the former hearing; they go to bonds merely. Let the defendant assign this judgment, and let the plaintiff have his costs incurred.

Decree for the plaintiff.

[19] The arguments of counsel are in part omitted.

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KENT v. CANTER'S EX'R.

(Court of Exchequer, Ireland, 1791. Wall. & L. 364.)

James Canter, the defendant's testator, and one Kennelly, whose administrator the plaintiff was, executed a joint and several bond and warrant to William Crilly, upon which Crilly obtained judgment against James Canter only. Kennelly afterwards paid off this debt by giving his own and his son's security for the amount of it, and obtained an assignment of the judgment against Canter to himself. Both Kennelly and Canter afterwards died; and this bill was filed by the plaintiff, as administrator of Kennelly, against the defendant, as heir and executor of Canter, for the recovery of this judgment, as having been the proper debt of Canter only, for whose use the money was originally raised. A decree was pronounced for taking an account of the real and personal estates of James Canter, and of the debts affecting the real estate. The officer reported the judgment as a debt affecting such real estate; and this report was excepted to on a supposition that such judgment was actually satisfied and extinguished by the payment of one of the co-obligors in the original bond, whereon that judgment was founded, and that consequently there was nothing to assign to Kennelly, who therefore must come in merely as a simple contract creditor.

But THE COURT (YELVERTON, C. B., and POWER and HAMILTON, BB.; Baron METGE having quitted the bench before judgment, but after argument, when he seemed inclined against the exception) held the report right, and that the payment was not a discharge of the judgment, so as to prevent an assignment thereof to Kennelly.

LUMPKIN v. MILLS.

(Supreme Court of Georgia, 1848. 4 Ga. 343.)

In Equity, in Floyd Superior Court, before Judge Wright, October Term, 1847.

The facts of the case are embodied in the opinion of the court.[20]

Judge LUMPKIN, being a relative to the plaintiff in error, did not preside in this cause.

NISBET, J. This was a bill filed by the plaintiff in error, as administrator, to marshal the assets of his intestate. The defendant in his answer set forth that as surety for the plaintiff's intestate upon a note of hand under seal he had paid the debt of his principal, and therefore claimed in equity to be subrogated to the rights of the creditor, and to come in, in the marshaling of the assets, as a bond creditor. The plaintiff in error claims that he is only an open account creditor.

[20] The argument of counsel is omitted.

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The question, therefore, and the only question made upon this record, is this: Can a surety, in equity, upon the settlement of an insolvent estate, who has paid a debt of his principal due upon an instrument under seal, be subrogated to the rights and substituted to the position of the creditor, so as to come in as a creditor under that instrument, or is he entitled only as a creditor by open account?

It is conceded in the outset that the authorities upon this subject do not run a uniform course. The early English cases are with the defendant, and recognize the right of subrogation. Cases of the very highest authority in Great Britain, decided since our Revolution, settle the rule differently, and deny his right to be paid, otherwise than as a creditor by open account. The American authorities are also in conflict, but we think their preponderance is in favor of the early British rule. The civil law also sustains that rule, and so do the authorities in those countries where the civil law is recognized. We think, upon principle, the rule of the British courts, anterior to our Revolution, right. If it was not, it is obligatory upon us as law. The civil law is the parent of that rule—as it is, in truth, of many, very many, of the principles of equity which obtain in the English chancery courts. That code is not of binding authority upon us, but I recognize in it, in reference to many titles of the law, and among them that of principal and surety, the very best system extant. Its broader, and more reasonable, and less fettered equity is gradually being transferred into the American jurisprudence. And where authorities are in conflict, and principles doubtful, a court does well to allow the Roman law to quiet the conflict and dispel the doubt. We have no difficulty, either upon authority or principle, in settling as the rule of this court that a surety, who has paid the debt of his principal, is in a court of equity entitled in all respects to occupy in the distribution of his estate the place of the creditor.

It is a well-settled doctrine of the common law that a surety, upon payment of the debt of his principal, is entitled to an assignment of all the independent securities in the hands of the creditor, with all the remedies which he had to enforce them against the principal. The Roman law goes farther. By that law, not only is he entitled to these securities, but he is also entitled to be substituted, as to the very debt itself, to the creditor, by way of cession or assignment. The debt in favor of the surety is treated, not as a paid, extinguished debt, but as sold to him; all its original obligatory force continuing against the principal. The surety is viewed in the light of a purchaser. The statement and reasoning of the civil law is as follows: "Fidejussoribus succurri solet, ut stipulator compellatur ei, qui, solidum solvere paratus est, vendere cæterorum nomina. Cum is, qui et reum et fidejussores habens, ab uno ex fidejussoribus accepta pecunia præstat actiones; poterit quidem dici, nullas jam esse; cum suum perceperit, et preceptione omnes liberati sunt. Sed non ita est; non enim in solutum accepit, sed quodammodo nomen debitoris vendidit. Et ideo

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habet actiones, quia tenetur ad id ipsum, ut præstet actiones." Of the reasoning upon which the civil law goes Mr. Story says: "It may seem a little artificial, but it has a deep foundation in natural justice." Pothier on Oblig. (by Evans) n. 275, 280, 281, 428, 429, 430, 519, 520, 521, 522; Dig. lib. 46, tit. 1, 1, 17, 1, 36; Pothier Pand. lib. 46, tit. 1, n. 46; 1 Domat, B. 3, tit. 1, § 3, arts. 6, 7.

This rule, I stated, is adopted in countries which recognize the civil law. Code Nap. arts. 1251, 1252; Bell's Dict. Art. Beneficium cedendarum actionum; Civil Code of Louisiana, arts. 2157, 2158; Voet, ad Pand. lib. 46, tit. 1, §§ 27, 29, 30; Huber, Proelect. Inst. lib. 3, tit. 21, note 8; Ersk. Inst. B. 3, tit. 3, art. 68; 1 Kaine's Eq. 122, 124. The courts of Great Britain, in some of the earlier cases, enlarged the rule that I stated was settled, to wit, that a surety is entitled to the independent collateral securities, with all the creditor's remedies to enforce them against the principal, and held that the surety should be also entitled to an assignment of the very debt itself, thus going the full length of the civil law, and subrogating him fully to the rights of the creditor. The rule, thus enlarged, we recognize as the common-law rule, at the time we adopted it. In Ex parte Crisp, Lord Hardwicke said that, where a surety paid off a debt, he was entitled to have from the creditor an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion. 1 Atkins, 133. In Morgan v. Seymour, the court decreed that the creditor should assign over his bond to the two sureties, to enable them to help themselves against the principal debtor. 1 Ch. R. 64. The principle was applied in a very strong case in Vernon. The principal had given bail in an action, and judgment was recovered against the bail. Afterwards the surety to the original debt was called upon and paid it, and it was held that he was entitled to an assignment of the judgment against the bail. So that, although the bail was but a surety, as between him and the principal debtor, yet coming in the room of the principal, as to the creditor, it was held that he likewise came in the room of the principal debtor, as to the surety. This case establishes that the surety has precisely the same rights that the creditor had, and shall stand in his place—a case of entire subrogation. Parsons v. Briddock, 2 Vernon, 608.

These three cases are anterior to the era of the Revolution, and demonstrate how the law stood at that time; and considering that we are not at liberty to depart from the common law, as it then stood, and that up to that time the rule was not seriously questioned, we might stop the review here. It may, however, be more satisfactory to press the discussion through the course of this question down to the present moment, and to look into the reasonableness of the modern English rule. Other cases since that era recognize the doctrine as held in the three cases referred to. It received an express recognition by the Chancellor in Wright v. Morely, 11 Vesey, 12, 21, 22, in which case the case of Parsons v. Briddock, in Vernon, is commented on and

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sustained. See, also, Dowbiggin v. Bourne, 1 Younge, 111, s. c. 2 Younge & Coll. 464; Butcher v. Churchill, 14 Vesey, 567, 575, 576; Ex parte Rushworth, 10 Vesey, 409, 414; Robinson v. Wilson, 2 Madd. 464; Craythorn v. Swynborne, 14 Vesey, 160, 162; Hotham v. Stone, 1 Turner & Russ. 226, note.

It is nevertheless true, as Mr. Story states, that the rule is now different in England. Without following the authorities minutely through, it may be stated that the late rule, which denies the right of the surety to a cession of the debt itself, and to a perfect substitution for the creditor, rests chiefly upon two comparatively recent cases, determined by two of the ablest Chancellors of England. I allude to the case of Copis v. Middleton, 1 Turner & Russ. 224, determined by Lord Eldon, and Hodgson v. Shaw, 3 Mylne & Keene, 183, determined by Lord Brougham. These are names of pre-eminent authority, and their weight settles all controversy about the matter at this moment in England. It is not a little remarkable that names of authority equally conclusive on this side of the water are arrayed against these potent chiefs of the English Chancery, to wit, Marshall and Kent.

Neither Lord Eldon nor Lord Brougham questions the rule that a surety is entitled to an assignment of the collateral securities. The former said: "It is a general rule in equity that the surety is entitled to the benefit of all the securities which the creditor has against the principal. But then the nature of those securities must be considered. When there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished. The general rule must be qualified, therefore, by considering it to apply to such securities as continue to exist and do not get back upon payment to the person of the principal debtor." Lord Brougham says: "Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment? The surety may enforce any security which the creditor has; but by the supposition there is no security to enforce, for the payment has extinguished it."

The whole of this reasoning is founded upon the technical idea that payment by the surety is an extinguishment of the debt; and, being so extinguished, if the evidence of it were assigned to the surety, it will avail him nothing. It may be true that, in a suit on the bond in the case at this bar by the surety, he might be met and defeated by plea of payment. Be it so. We are not in a court of law. And really it would seem that the reasoning of these great Chancellors would rather fall appropriately from the lips of Lord Kenyon or Mansfield in a court of law than from theirs in a court of equity. For it will be seen that the rights of the surety in this matter depend upon no such subtle technicality, but upon an equity which springs out of the fact of payment, and out of his relation to the principal debtor. It may be well questioned whether, upon principles of com-

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mon sense and common equity, the payment by a surety out of his own funds of the debt of another, in the consideration of which he was not at all interested, ought to be considered, as to the surety, an extinguishment. Upon a question as to the right of subrogation a Chancellor ought not so to hold it. These cases go upon the fact that the debt is in law extinguished. The civil law, addressing itself to the equity of the transaction, will not admit that it is extinguished, but bought by the surety. A purchaser of a negotiable security for value would, upon the instrument, acquire the rights of the original creditor. How can he occupy a position in a court of equity more favorable than a surety? The equities are stronger in favor of the surety.

Whilst upon this phase of the argument, it may be well to say that it is quite immaterial whether there is in point of fact an assignment of the debt or not; for if, upon equitable principles the surety is entitled to it, chancery will consider that as done which ought to have been done. (Lidderdale's Ex'rs v. Robinson's Ex'r, 12 Wheat. 596, 6 L. Ed. 740), and, if necessary, would decree an assignment to be made. Equity will not permit the creditor to prejudice the rights of the surety, by a refusal to make an assignment. Upon what principle is it that the surety is entitled to the collateral securities in the hands of the creditor? It is not by virtue of a contract between him and the principal. The only contract between them is the implied contract which results from the relation of principal and surety; and that is that, if the surety is compelled to pay the debt, the principal will reimburse him. It is upon this implied contract that the surety is entitled to his action for money paid to the use of his principal. This contract does not give him the right to the collateral securities. How, then, do Lords Eldon and Brougham arrive at the right of the surety to the collateral securities? It is by invoking the equity which flows necessarily out of the payment and relationship of the parties. Hear what Lord Brougham says: "The rule here is undoubted, and it is founded upon the plainest principles of natural reason and justice, that a surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than contract or quasi contract unless in so far as the known equity may be supposed to be imputed into a transaction, and so to raise a contract by implication."

Now, what I have to say in reference to this reason, is this: It applies with equal force in favor of the surety's right to a transfer of the debt itself as in favor of his right to a transfer of the collateral securities. He is entitled to the latter, not by contract, but according to principles of natural reason and justice. By these principles he is made to stand in the place of the creditor. And, so standing, the right to the collateral securities follows. Here is the doctrine of substi-

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tution recognized, and the powers of a court of chancery are invoked to give it effect. The doctrine once admitted, and it seems to me impossible to escape from the conclusion that, whatever are the rights of the creditor anterior to the payment and subsisting at the time, they devolve upon the surety. The principles of natural reason and justice pass them to him. And one of these rights, in the case before us, is to be let in, in the distribution of the estate of the debtor, as a specialty creditor, if the debt had not been paid by the surety. He, paying it, is subrogated to that right. He is clearly as much subrogated to that right as he can be to the right of enforcing a mortgage or any other collateral security. I cannot, I do not, recognize the conclusiveness of the reason that the bond is paid, and therefore, as to that, the substitution cannot take place. The substitution of the surety is not for the creditor as he stands related to the principal after the payment, but as he stood related to him before the payment. He is subrogated to such rights as the creditor then had against the principal, one of which unquestionably was to enforce his bond against the principal, and, if he was insolvent, to be let in as a bond creditor. What difference is there between permitting a surety to reimburse himself out of a mortgage lien held by the creditor, and permitting him to take out of the estate generally of the principal, the amount he has paid? If he realizes upon the mortgage, he abstracts the amount which he has paid from the estate of the principal; if he realizes on the bond, the mortgaged property goes back into the common fund, and the result to him and to other creditors is the same. The very fact that the surety could not enforce the bond at law is a reason in equity why he should be allowed to come into the distribution as a bond creditor. So determined, as I shall show, in New York. With profound reverence for these profound jurists, I may be permitted to say that the reasoning upon which their judgment is founded is not, to say the least of it, conclusive.

Inconsistent, too, with their reasoning, is the rule as to the rights of sureties, which has been adopted in the English courts of bankruptcy. If the creditor, in case of the bankruptcy of the principal debtor, has proved his debt before the commissioners, and then the surety pays the debt, the latter will be entitled to the dividends declared on his estate, and the creditor will be held his trustee for that purpose. Ex parte Rushworth, 10 Vesey, 409; Wright v. Morely, 11 Vesey, 12, 22; Watkins v. Flannagan, 3 Russel, 421; Ex parte Houston, 2 G. & Jamieson, 36; Ex parte Gee, 1 G. & Jamieson, 330. So, also, the surety may compel the creditor to go in and prove his debt before the commissioners, and then, if he pays the whole debt, the creditor will in like manner become a trustee of the dividends for him. 10 Vesey, 409, 414; Wright v. Simpson, 6 Vesey, 734. In these cases the surety is subrogated to the rights of the creditor upon the specific debt which is due him by the bankrupt.

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The fact of proving his debt before the commissioners can create no stronger equity in favor of the surety than that which results to him, in case of the insolvency of the estate of the debtor, after his decease. In marshaling the assets of a decedent, a court of chancery would allow a bond creditor his dividend, according to the dignity of his debt, only upon the debt being proven. Upon the principles of the rule in bankruptcy, if a decree marshaling assets should allow a creditor his dividend, it would be considered that his debt had been proven; and if the surety should then step forward and pay it, he would be entitled to all the creditor's rights under that decree. In equity, without such decree, it would seem that his rights ought to be the same. The equity which substitutes him at all ought to substitute him always upon the payment of the debt.

The authority of Mr. Story is claimed in support of the doctrine as taught in Copis v. Middleton and Hodgson v. Shaw. The claim is questionable. It is even doubtful whether the opinion, from all that appears, of that learned jurist be not against that doctrine. As a faithful commentator, it was his duty to state the rule, as it was settled at the time he wrote. He does state it to be settled according to the decisions of Lords Eldon and Brougham. It is very strange, however, that in his review of this question Judge Story has failed to refer to numerous leading American cases. For example, I do not find that he notices at all the Virginia decisions—that of Chief Justice Marshall in Brockenbrough among them. Nor has he quoted even the solemn judgment of the Supreme Court of the United States against what he states to be the settled rule. It is passing strange that, in commenting on a doctrine differently decided in England and in our own courts, such authority as Marshall on the circuit and the Supreme Court should either escape him or be considered unworthy of comment. To return, however, to his opinion upon this subject. It is very apparent that he does not fully give in to the rule as settled. In speaking of the contrary doctrine, he speaks doubtingly of its being an erroneous opinion. "The error of the contrary opinion," says he, "if, indeed, upon the principles of enlarged equity any there be, seems to have arisen," etc., clearly expressing a doubt in his own mind whether the contrary opinion be erroneous. 1 Story's Com. on Eq. § 499. In commenting on the rule of the civil law, as opposed to the cases of Copis v. Middleton and Hodgson v. Shaw, he remarks: "It is not wonderful that courts of equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties, as well as to the demands of justice, should have struggled to adopt it into the equity jurisprudence of England. The opposing doctrine [that of Copis v. Middleton and Hodgson v. Shaw] is founded more on technical rules than on any solid reasoning, founded on general equity." Again, he says: "Whether it might not have been as wise for courts of equity to have followed out the Roman law to its full extent, instead of adopting a modified rule,

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which stops or may stop short of some of the purposes of reciprocal justice, it is now too late to inquire, and therefore the discussion would be useless." 1 Story's Com. on Eq. § 499, c. note 3. Now this is not the language of approval. It is rather that of regretful disapproval.

The weight, I have stated, of the American cases, is with the old common-law rule, very respectable authorities being against it. In Tennessee, a surety who has paid the judgment against his principal is substituted in equity to all the rights of the judgment creditor; nor need the creditor be made a party where a bill is filed by the surety to enforce it. McNairy v. Eastland, 10 Yerg. 310. In Perkins and Others v. Kershaw and Others, Judge O'Neal, although no judgment was rendered to the extent that a surety is substituted for the creditor as to the identical debt paid, yet uses language so general and sweeping as to imply that position. He says: "The surety, who pays the debt of his principal, has a right to be remitted to all the rights and securities of the creditor. He is, in equity, substituted for the creditor." 1 Hill, Eq. (S. C.) 351. In Burrows v. McWhann, the court goes the length of adjudging that a judgment in favor of the creditor against the principal debtor, although actually discharged on the record, when the debt is paid by the surety, shall be revived for the purpose of giving effect to his right of subrogation. No case could be stronger than this. The debt is in judgment, and a lien is thereby created in favor of the creditor against the estate of the principal, yet the surety who pays that judgment, even after an entry of satisfaction, is substituted for the creditor on that judgment, and the lien enures to his benefit. 1 Desaus. (S. C.) 409, 1 Am. Dec. 677. To the same extent is the case of Sprigg v. Beaman, 6 La. 59. In that state, however, as is well known, the civil law to a great extent prevails. The rule of the civil law as to substitution is embodied in the Civil Code of Louisiana. Civ. Code La., arts. 2157, 2158.

In the New York chancery it may be assumed as an incontrovertible fact that the rule of the civil law prevails. There a surety who has paid the debt is considered as a purchaser of the security upon which it is founded. Chancellor Kent, in Cheesebrough v. Millard, says: "If a creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser, either against the principal debtor or the co-sureties." 1 Johns. Ch. 413, 7 Am. Dec. 494. Now this dictum asserts more than that the surety is entitled to a cession of the collateral securities and to the rights of the creditor thereon. It declares the principle of the civil law, that he is to be considered as a purchaser from the creditor of the debt. It therefore denies the position of Lord Eldon, that the payment by the surety is an extinguishment of the debt, and of course all the conclusions drawn from that position. To show that Chancellor Kent is to be understood as going that far, I advert to the fact that he, in

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this case, quotes and comments on, approvingly, both the Roman law and the old English cases of Ex parte Crisp, in Atkins, and of Morgan v. Seymour, in 2 Ch. Rep. 64. See, also, King v. Baldwin, 2 John. Ch. (N. Y.) 560, and Hays v. Ward, 4 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 554.

In 1836, Chancellor Walworth speaks yet more explicitly, if possible, as follows: "The equitable principles of the civil law as to suretyship have long since been established as the law of this court upon that subject. One of the fundamental principles of that law is that co-sureties or joint cautioners are bound to contribute equally as between themselves to the discharge of the common burden. And another is, if one surety pays the whole debt for which they were jointly bound, he is entitled to the cession of the rights and remedies of the creditor, not only as against the principal debtor, but also as against his co-sureties. Or more properly, according to the modern doctrine upon this subject, the surety, by the mere payment of the debt, and without any actual assignment from the creditor, is in equity subrogated to all the rights and remedies of the creditor, for the recovery of his debt against the principal debtor or his property, or against the co-sureties and their property, to the extent of what they are equitably bound to contribute." Cuyler v. Ensworth, 6 Paige (N. Y.) 32, 33. See, also, Eddy v. Traver, 6 Paige (N. Y.) 525, 31 Am. Dec. 261. I quote this extract because of its declaration that the equitable principles of the civil law had long been established as the law of the Chancery Court of New York. Now the principle of the civil law is absolute and unrestricted substitution. In Ontario Bank v. Walker and Others, the creditor had obtained a judgment jointly against the principal debtor and three sureties. One of the sureties paid it, and moved the court for an order giving him the control of the judgment. Held, that he could not get the control at law, because it was extinguished, but, if he was in fact surety, upon a proper case made, equity would, in that particular, subrogate him to the rights of the creditor, because it could not be done at law. 1 Hill (N. Y.) 652, 653. See, also, the dictum of Marcy, J., in New York State Bank v. Fletcher, 5 Wend. (N. Y.) 85, 89.

In Virginia it is settled that the surety of a bond debtor who has paid the debt, in the settlement of the estate of his principal, is subrogated to the rights of the creditor, and is let in to a dividend as a specialty creditor, and not as a creditor by open account. In Eppes et al., Executors of Wayles, v. Randolph, the surety of a bond debtor paid off the debt, but took no assignment of the bond, and filed his bill to charge the real estate of his principal, upon the ground that he succeeded to all the rights of the creditor by the mere fact of payment. The right was resisted upon the ground that he had taken no assignment of the bond. The court decided that he was entitled, and decreed accordingly. 2 Call, 125. See, also, Tinsley v. Anderson, 3 Call, 329.

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The leading case in Virginia is Lidderdale v. Robinson, determined by Chief Justice Marshall on the circuit, and taken up to the Supreme Court. The case was this: Robinson and Smith were joint indorsers for one Roots on a bill of exchange drawn by him. Robinson and Smith had to take up the bill, and Smith paid more than his moiety. His administrators filed a bill to compel Robinson to reimburse him, in the excess of his payment over and above his moiety. Robinson being largely in debt, and his assets being likely to prove insufficient to pay the whole, the right of priority became a question among the creditors.

Under a statute of Virginia, protested bills, after the death of the drawer or indorser, are made of equal dignity with judgments. Under this statute, and also upon equitable principles, the executors of Smith claimed to be, by substitution for the creditor, let in to a dividend, as a judgment creditor of Robinson, to the extent of his payment above one moiety of the debt. It was contended that he was entitled only as a creditor by open account. It will be perceived that the statute of Virginia did not affect this question. That only gave the bill the dignity of a judgment. It does not affect the question of substitution. Judge Marshall held, in an opinion which surveys the whole field of this argument, and which is characterized by his transcendent ability, that the surety was subrogated to the rights of the creditor on the bill of exchange, and that he was entitled to share in the distribution of Robinson's assets as a judgment creditor. He placed his opinion upon the broad ground of equity, springing out of the relationship of the parties to the bill of exchange, and the fact of payment by the surety, irrespective of any assignment, or of any idea about the extinguishment of the debt. There, I think, the question ought to be placed. The province, to my mind, of a Court of Chancery is, in cases of manifest equity, to give relief, although it may be at the expense of reasoning which is purely technical. "The claim of the surety," says Chief Justice Marshall, "is clothed in equity, with the legal garb with which the original contract is invested." 2 Brock. 159, 163, Fed. Cas. No. 8,337. Upon a division of the district bench, this case went up to the Supreme Court. That court unanimously sustained the decision of Chief Justice Marshall, and their judgment is supported in an able argument by Mr. Justice Johnson. 12 Wheat. 594.

It is a rule of the Supreme Court, if the law of a state is well settled, to determine questions originating altogether in that state according to that law. A uniform course of decisions in Virginia might have been considered by the Supreme Court as settling a local rule upon this subject. Doubtless they did consider the law as established there. But, lest it might be believed that the decision was founded upon the local law alone, the court says: "That this, then, is the settled law of the state, in which this contract and this cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correct-

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ness on a general principle, and on authorities of great respectability in other states." 12 Wheat. 594, 598, 6 L. Ed. 740.

We are the better satisfied with our judgment in this case, for the reason that the substitution does injustice to no one. The creditor, of course, has nothing to do with it. He is satisfied, and if the representatives of the principal, if he be dead, or if the principal debtor himself, being in life, can be presumed to be unaffected by the paramount equity of his sureties' claim, he and they must be presumed to be indifferent whether it is allowed to him, or is reserved for creditors of a lower grade. Let the amount of the claim go either way, no injustice can be done to him. In any event, it goes in payment of his debts. If anybody is entitled to complain, it is the creditor who, holding a lower grade of claim, is excluded by the substitution of the surety. But, really, no injustice is done to him. The surety, by paying the debt to the creditor, abstracts from the assets of the principal debtor just that amount which the creditor himself would have abstracted, if he had not paid it. The surety could compel the creditor, indeed, to go upon that fund before resorting to him. Story's Com. vol. 1, 592; 1 Vern. 1, 89; 6 Ves. 734; King v. Baldwin, 2 John. Ch. (N. Y.) 561, 562. So the creditor by claim of lower grade is in no worse condition than he would be if the security had not paid the debt.

Our judgment, too, derives support from the obvious policy of all our own legislation relative to the substitution of sureties. That policy is to place the surety in the place of the creditor. Witness the several acts of the Legislature giving to sureties the control of executions against their principals, when paid by them. Counsel for the plaintiff in error have sought to draw from these acts the contrary inference. The right of substitution being given by express act of the Legislature, the inference, say they, is that, in the judgment of the Legislature, it did not before exist. But we think the legislation of Georgia upon this subject is in affirmance of the right as it existed upon general equitable principles before, and is only intended to cumulate and simplify the remedy by which it is enforced.

Let the judgment of the court below be affirmed.[21]

[21] Nearly all American states have abolished by statute the priority of specialty debts over simple contract debts: See 8 A. & E. Ency. of Law (2d Ed.) pp. 1041, 1042.

There are, however, in many states preferred claims against the estates of decedents. See 8 Am. & Eng. Ency. of Law (2d Ed.) pp. 1041–1054.

Some American jurisdictions are contra to the principal case, and follow the doctrine of Copis v. Middleton, 1 Turn. & Russ. 224 (1823), holding that a surety, on paying a joint specialty or other joint instrument on which he is a surety, cannot by payment avail himself of the instrument for the purpose of subrogation. Bledsoe v. Nixon et al., 68 N. C. 521 (1873). See Kennedy v. Pickens, 38 N. C. 147 (1843). That in North Carolina all contracts are several, see State ex rel. v. Brodnax, 83 N. C. 401 (1880). See, also, Bradhurst v. Pearson, 32 N. C. 55 (1849); Uzzell v. Mack, 4 Humph. (Tenn.) 319, 40 Am. Dec. 648 (1843); Greenlaw v. Pettit, 87 Tenn. 467, 11 S. W. 357 (1889). Buck-

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Ex parte WARE.

(Court of Appeals of South Carolina, 1853. 5 Rich. Eq. 473.)

This was an appeal from the judgment of the ordinary.

N. M. Ware, deceased, the intestate, and William Ware, were, at the death of the former, indebted to the representatives of Thos. Kirkpatrick, by two joint and several sealed notes. N. M. Ware was the principal, and William Ware his surety. The notes were paid by William Ware after the death of his principal. He presented them before the ordinary, and claimed to be entitled to rank as a specialty creditor of the estate of the intestate. The ordinary thought he was only entitled as for so much money paid, and rejected his claim as a specialty creditor. He appealed.

DUNKIN, Ch. The statement of facts appears from the brief of the solicitors, together with the judgment of the ordinary.

It will be remarked that the sealed note is joint and several. At the decease of the intestate, N. M. Ware, the representatives of Thomas Kirkpatrick, the payees, were specialty creditors of the estate of N. M. Ware, deceased. In Morton & Courtney v. Caldwell, 3 Strob. Eq. 161, it was ruled by the court that "the proper mode of determining the

ner v. Morris, 2 J. J. Marsh. (Ky.) 121 (1829); Moore v. Campbell, 36 Vt. 361 (1863).

In some jurisdictions the rule in Copis v. Middleton has been abrogated by statute: Alabama: Code 1876, § 3418, applied in Knighton v. Curry, 62 Ala. 404 (1878), and Turner v. Teague, 73 Ala. 554 (1883), and nullifying the prior holding in Foster v. Trustees, 3 Ala. 302 (1842).

In accord with the principal case, and holding that the surety's right to subrogation extends to all securities held by the creditor prior to the payment by the surety including joint specialties to which the surety and the principal are parties, are Powell's Ex'rs v. White, 11 Leigh (Va.) 309 (1840); Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279 (1848); Muldoon v. Crawford's Adm'r, 14 Bush (Ky.) 125 (1878), payment made by surety after principal's death (Quære, whether this does not overrule Buckner v. Morris, supra); Orem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286 (1879), payment made by surety after principal's death, who was a debtor to the state; Crisfield v. State, Use of Handy, 55 Md. 192 (1880), surety of bankrupt fiduciary subrogated to obligee's rights against bankrupt after his discharge; Mott v. Maris, 2 Wash. C. C. 196, Fed. Cas. No. 9880 (1808), surety on bankrupt's bond to United States for duties; Shultz v. Carter, Speers, Eq. (S. C.) 533 (1844), payment made by surety after death of principal, entitling surety to rank as a bond creditor.

The same principle has been applied to joint contracts not specialties: Braught v. Griffith, 16 Iowa, 26 (1864), payment of a joint note after principal's death by surety who was subrogated to the class of creditors in which payee ranked; Lidderdale's Ex'rs v. Ex'r of Robinson, 12 Wheat. 594, 6 L. Ed. 740 (1827), a joint indorsement.

Some courts take a middle position, following the English cases when the payment of a joint liability is made by the surety in the lifetime of his principal, but holding that a surety who has paid the debt of a deceased principal is entitled to subrogation to specialties on which he was jointly bound. Cromer v. Cromer, 29 Grat. (Va.) 280 (1877).

On the non-application of the doctrine of merger, so as to destroy the surety's Equity of Subrogation, see note, 13 H. L. R. 609.

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proportion of assets liable to the respective creditors of a deceased debtor is to assign them according to the amount of the debts as they existed at his death." It is there said that "if, upon any of the demands thus taken into consideration, any payments have subsequently been made by a third party, that does not release the proportion of the deceased's assets originally liable to the creditor, if there still remains due on the demand a balance requiring that proportion to satisfy it." The Chancellor also clearly intimates the opinion that if the party who made the payment was only surety for the debt he would become entitled (if he had paid the whole debt), by way of reimbursement, to the proportion to which the original creditor was entitled. And in King v. Aughtry, 3 Strob. Eq. 149, the right of the surety who pays the debt of the principal was considered, and the doctrine of our own courts, in affording protection to sureties, recognized and enforced. See, also, Thomson v. Palmer, 3 Rich. Eq. 139. My opinion is that the appellant was entitled to rank as a specialty creditor of the estate of N. M. Ware, deceased; and, in conformity with the thirteenth section of the act of 1839, regulating appeals from the court of ordinary, it is ordered and decreed that it be referred to the commissioner of this court to restate the account according to the principles herein declared.

The administrator of N. M. Ware appealed, on the grounds:

(1) Because, it is respectfully submitted, his honor erred in deciding that a surety who paid a single bill to the obligee, after the death of the intestate, the principal, was remitted to the rights of the obligee, and ranked as a specialty creditor.

(2) Because the ordinary, in deciding questions in his court, must be governed by the law and practice established therein, which do not recognize the right of subrogation, and that to require the court of ordinary to conform in all respects to the court of equity would subvert the independence of the former court, and render it, in substance, a subordinate branch of the court of equity.

PER CURIAM. This court is of opinion that there is no error in the decree of the Chancellor; and it is ordered that it be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN, DARGAN, and WARDLAW, CC., concurring.

Decree affirmed.

TAYLOR v. FARMERS' BANK.

(Court of Appeals of Kentucky, 1888. 87 Ky. 398, 9 S. W. 240.)

Judge HOLT delivered the opinion of the court.

This is a question of subrogation. October 10, 1877, William Timberlake drew a bill of exchange for $7,140.03 upon Henry C. Timberlake, payable to the order of John W. Menzies. It was indorsed by

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the latter, after having been accepted by Henry C. Timberlake, and then delivered to the latter and negotiated by him for his benefit.

March 18, 1878, the Farmers' Bank of Kentucky sued the three parties above-named upon the bill, and subsequently recovered a judgment. Execution upon it was returned nulla bona, save about $1,000, made out of the estate of William Timberlake; the Timberlakes and Menzies being insolvent. The latter was an accommodation indorser, and has never paid anything upon the judgment. March 21, 1878, the appellee, Susan A. Timberlake, her husband, Henry C. Timberlake, joining with her as a legal necessity to the step, mortgaged to John W. Menzies a tract of land belonging to her.

The condition of the mortgage is as follows: "This conveyance is made to secure, indemnify and save harmless the said Menzies against any loss he may sustain by reason of his indorsement of a draft, dated October 10, 1877, drawn by William Timberlake on the said Henry C. Timberlake for his accommodation, at four months, for $7,140.03, and indorsed by said Menzies, and negotiated by said Henry C. Timberlake for his own benefit, and upon which the Farmers' Bank of Kentucky has brought suit in the Kenton circuit court; and if said Menzies is not required to pay any part of said claim, this conveyance will stand for naught, otherwise it will remain in full force. * * * The said Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim, which he may avoid by any and all lawful efforts."

December 7, 1882, the bank, by a written transfer, assigned the judgment to the appellants, together with "all the rights and equities of every kind or nature" connected with it.

Henry C. Timberlake died insolvent in 1880; and on December 12, 1882, the appellants brought this action, asking to be substituted to all the rights of Menzies under the mortgage of indemnity to him, and that the land of Mrs. Timberlake be subjected to the payment of their judgment.

The matters above recited are to be taken as true, as they are set out in the petition, and it was dismissed upon demurrer.[22] * * *

Had the bank a right to be substituted to Menzies' place under the mortgage? If so, then the appellants, as its assignees, have the same right.

The doctrine of subrogation comes to us from the civil law. It is not the creature of contract, but of natural equity, although it has been said that it may be modified by contract. It is applied between parties, where the circumstances require it, that essential justice may be afforded, but not where it will work injustice to others.

The rule is well settled that, where a security is given by a principal to his surety, it operates eo instanti as a security to the creditor for the

[22] A portion of the opinion has been omitted.

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payment of his debt. This right of the latter cannot be defeated, even by the release or conveyance of the surety or mortgagee, unless the liability be contingent, save to a bona fide purchaser without notice; and, if contingent, the surety cannot defeat it after his liability becomes fixed. The reason of this rule is that the security given by the principal debtor to his surety is regarded in equity as a trust fund for the payment of the debt. All the property of the principal debtor is liable for his debt; and it does not lie in his mouth, therefore, to say that it is not in trust for the creditor when pledged to the surety as indemnity. The creditor may, through the medium of the surety, resort to the property thus placed in trust for the payment of the debt, and is invested by equity with all the rights of the surety.

In such a case the security is for the debt, as well as the ultimate protection of the surety. It is at once clothed with a trust character; and the creditor immediately acquires a right and interest in it that cannot be defeated by the act of the surety. He becomes a trustee for the creditor. So, too, upon like principles of justice or natural equity, where a principal indemnifies one of several sureties, he becomes a trustee for the others, and each is entitled to share the indemnity. The estate of the principal is liable for the debt, and his obligations to them are equal.

A different state of case is presented, however, where the contract of indemnity is by a stranger to the debt, and for the personal benefit of the surety merely, in opposition to the idea of a trust for the payment of the debt. In such a case the indemnity is not out of the estate of the principal.

It was said in the case of Osborn v. Noble, 46 Miss. 449: "We think the principle has been stated, and enforced, that if the security be purely personal, as to indemnify and save harmless the surety, and not for the better protection of the debt, or intended as a fund for its payment, a trust does not attach to it for the creditor."

Here Mrs. Timberlake was in no way liable for the debt. The fact that she was the wife of Henry C. Timberlake makes no difference. The indemnity was not out of his estate. The wife was under no obligation to pay the debt, and must be regarded, as indeed she was, as a stranger to it. It was no fraud upon the creditor to merely indemnify the surety. As the property belonged to her, if the mortgage created no lien to secure the payment of the debt, then no trust was created in favor of the creditor, since it is certain that the bill of exchange was not accepted upon the faith of the indemnity. It was not furnished to the surety until long after the creation of the debt, and, indeed, not until suit was brought upon it.

Her contract must be regarded as one merely to save the surety harmless, as undertaking merely to indemnify him against the payment of the debt, and pledging the mortgaged property to him for whatever he might be compelled to pay, and not as security for the payment of the debt. It is true the mortgage recites: "The said

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Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim, which he may avoid by any and all lawful efforts." But, when the entire instrument is considered, it is evident the purpose was merely to indemnify Menzies.

This being so, no right of subrogation exists in behalf of the appellants. Their claim is not supported by that equity which would attach to it if the debt had been accepted upon the faith of an indemnity created by the mortgage for its payment.

These views are supported and ably enforced by the opinions in the cases of Leggett v. McClelland, 39 Ohio St. 624, and Macklin v. Northern Bank of Kentucky, 83 Ky. 314; and the judgment below is affirmed.[23]

[23] The right of a mortgagee in equity to recover a deficiency against the purchaser, who has assumed the mortgage debt, is worked out by the theory that (inter se) the purchaser has become the debtor and his vendor has become a surety. The mortgagee, being the creditor of the surety (assuming him to be personally liable), becomes entitled to enforce all collateral held by the surety, including the contract between vendor and purchaser. Mount v. Van Ness, 33 N. J. Eq. 262 (1880).

See note in 15 H. L. R. 398, "A Mortgagor as Surety for His Assignee."

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CHAPTER IV

THE SURETY'S EQUITY OF CONTRIBUTION

HOLE v. HARRISON.

(High Court of Chancery, 1675. Sel. Cas. Ch. 246.)

(See 1 Vern. 70, 297, 404, 440.)

Hole, Harrison and S. were bound in a recognizance to the chamberlain of London. The plaintiff Harrison was sued thereon, and paid the whole money, and now sued Hole, who was bound with him, for contribution. Hole, Harrison and S. being all bound, and J. H. was dead insolvent, and S. was run away. The question was in what proportion the contribution could be, viz., of a third or moiety? Decreed a moiety, for S. is insolvent.

HOLE v. HARRISON.

(High Court of Chancery, 1673. Finch, 15.)

Robert Jones, one of the executors of Thomas Diamond (who left George Diamond, his son, an orphan in London), having a considerable sum of the orphan's money in his hands, was admitted to keep the same upon security, who prevailed on the plaintiff John Hole, and the defendant Harrison, and one Hutchins (since deceased), to enter into a recognizance of £300. to Sir Thomas Player, then chamberlain of London, conditioned to pay the sum of £195. and interest to Diamond the orphan, and the said Robert Jones gave them a counterbond of £600. to indemnify them against the said recognizance, he being then a merchant of good credit in London; afterwards the defendant, Harrison, alone was sued upon this recognizance (tho' the plaintiff Hole was then a public tradesman), and judgment was obtained against him, and he and his bail taken into execution. Not long afterwards Jones (who was then beyond sea) returned into England, and was arrested by Harrison on his counterbond, and judgment was obtained against him, and he was taken in execution, and afterwards swore himself out of prison upon the £10. act, and Hutchins being since dead insolvent, the now defendant Harrison exhibited a bill in the Lord Mayor's Court against the now plaintiff Hole, for a moiety of the money which he had been compelled to pay to the chamberlain of London, together with damages and costs, which cause was removed into this court by certiorari, where Hole sought to be discharged

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from paying any part of the said money; for that Harrison having taken a counterbond of Jones, had relied on that security, which he had confirmed by charging him in execution; and tho' Hutchins died insolvent, yet his executor or administrator ought to have been made a party to this suit.

THE COURT was of opinion that there ought to be a contribution between the plaintiff and defendant, and that both parties should take their remedy against the executor of Hutchins, but that such executor ought to have been made a party to the bill which was now ordered, and to bring on the cause again.

COOKE v. ————.

(Court of Chancery, Trinity Term, 1686. Freem. Ch. 97.)

Three bound in a bond, one being principal and the other two sureties; afterwards a fourth man becomes bound to the obligee, that if the other three did not pay according to the condition of the bonds, that he would pay; a month after one of the two sureties pays the money, and prefers his bill against the fourth now for contribution; and the question was, whether he should be bound to contribute, his being but a supplemental security? And the MASTER OF THE ROLLS seemed to think that he should.

RAINEY v. YARBOROUGH.

(Supreme Court of North Carolina, 1842. 37 N. C. 249, 38 Am. Dec. 681.)

This cause, after being set for hearing, was transmitted on the affidavit of the defendant from Caswell Court of Equity, at Spring Term, 1838, to the Supreme Court. The questions in the case are stated in the opinion delivered in the Supreme Court.

RUFFIN, C. J. In 1816, Thomas Boulden was appointed by a court in Virginia the guardian of several infant children named Glenn, and entered into bonds in large penalties with the usual conditions for faithfully accounting for the estate of the wards, seven in number, in which the present plaintiffs and Smith, the intestate of the present defendant, were his sureties. Boulden afterwards died, and Eustace Hunt administered on his estate. In 1831, Archibald Glenn, one of the wards, having come of age, preferred a demand against Hunt, as the administrator of Boulden, and against the said sureties for a large sum, as a balance due to him from his late guardian. And by an agreement between Glenn, Hunt, and all the sureties of Boulden, except Smith, the matters in dispute, in relation to the guardian account of Boulden, and also in relation to the administration account of Hunt as administrator of Boulden, were referred to the arbitrament and

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award of two persons. The arbitrators proceeded to hear the parties, and "awarded that there was a balance due from the estate of said Boulden, deceased, to the said Archibald Glenn of $5,533.35, with the interest thereon from the 25th of December, 1827." To this arbitration Smith refused to become a party; and, after the award, he refused also to pay any part of the sum; but died intestate, and the defendant, Yarborough, became his administrator.

The present suit is brought against Smith's administrator by the other sureties or their representatives, and charges that Boulden was indebted to his ward in the sum found, and that he died insolvent, and that Hunt had no assets to satisfy that sum or any part of it, and that those sureties were obliged to pay the whole of it, and had done so; and the object of the bill is to compel contribution from the defendant of his intestate's aliquot part.

The answer brings forward divers points of defense, but particularly insists that Smith was not bound by the award, and refuses to admit that any sum was due from Boulden to his ward, A. Glenn, or that Boulden's estate was insolvent, or that Hunt had not assets to pay whatever, if anything, was due.

The case was submitted on the hearing a year ago, and was allowed by the court to stand over, that the parties might have an opportunity of sending the cause back for the purpose of framing the pleadings properly, with the view to the determination of the real controversy. The necessity for the insertion of additional matter in the bill, and making other parties, is obvious. In the first place, as Smith was not a party to the arbitration, the award has no operation against him, but he is chargeable only upon an account to be taken in this cause of Boulden's guardianship. Moreover, the insolvency of Boulden's estate, and the full administration of his assets by Hunt, are not admitted, nor even found in the award; and, consequently, those facts are now to be established in the cause. That, also, can be done only by taking the administration account in this cause. To the taking of each of those accounts, Hunt, the administrator, is an indispensable party; for the plaintiffs have no equity against their co-surety, until it be shown, that they cannot obtain satisfaction from their common principal. It may be that Hunt has now funds for that purpose. Indeed, from the omission for a year on the part of the plaintiffs to take the steps indicated by the court, we are led to suppose that between Mr. Hunt and themselves some understanding may have taken place, and that they have, in consequence, abandoned this suit. But, however that may be, it is certain they cannot get a decree upon their present bill, and, as the defendant insists on the judgment of the court being given, we do not feel at liberty to defer it longer, but must dismiss the bill, for the foregoing reasons, and with costs.

PER CURIAM. Bill dismissed, with costs.[1]

[1]Accord: Bolling v. Doneghy, 1 Duv. (Ky.) 220 (1864).

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KEMP v. FINDEN.

(Court of Exchequer, 1844. 8 Jur. 65, 12 Mees. & W. 421.)

Assumpsit for money paid. Plea, non-assumpsit. At the trial before Alderson, B., it appeared that the action was brought under the following circumstances: A warrant of attorney had been given by two persons of the name of Carter as principals, and the plaintiff and defendant as their sureties. Default having been made by the principals, judgment was entered up on the warrant of attorney, and execution issued against the plaintiff, who now brought this action against the defendant as his co-surety, for contribution, to recover one-third of the whole amount.

On this state of facts, it was objected by the defendant's counsel at the trial, first, that the action was not sustainable in this form, as the money was paid to the use of the principals in the warrant of attorney, and not to that of the co-surety, and, consequently, that the plaintiff should have declared specially on the implied contract on the part of the defendant to indemnify; secondly, that, even supposing the plaintiff entitled to recover in this form of action, the defendant was only liable for one-fourth instead of one-third of the whole, there being four names on the warrant of attorney; thirdly, that, at all events, he was not liable for the costs of the execution on the warrant of attorney.

The learned judge, however, overruled these objections, and left the case to the jury, reserving leave to the defendant to move the court, either for a non-suit on the first point, or to reduce the damages on the two last.[2]

Lord ABINGER, C. B. No rule ought to be granted in this case. With respect to the chief point which has been raised, relative to the right of the co-surety to sue his companion, the general principle of law is that, if a man pay money which another is liable to pay, he may bring an action for money paid to the use of that person, although the money was paid without any special authority from that person. That is the case here, and, consequently, the present action is maintainable.

As to the second point, we must consider the two Carters as one person, so that the sureties are, inter se, liable for half, while the principal is liable for the whole, and each surety is liable for half of the costs incurred in putting into execution the warrant of attorney, on which they are all liable.

As to the point made relative to the attestation of the warrant of attorney, it was competent for any of the parties to have moved the court to set it aside; and, as they have not done so hitherto, we ought not to entertain such an objection now.

[2] The arguments of counsel are omitted.

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PARKE, B. I am of the same opinion. If I, at your request, put myself in such a situation as will save you from an action, and do so by paying a sum of money, I may maintain an action for money paid to your use. Now, that is the case of a co-surety; he puts himself in this position, that he is to pay a debt for his companion; he does pay that debt when he pays the whole amount of the obligation, for half of which he and the defendant were liable, and is, consequently, entitled to maintain this action. The case of a guarantee is different, for there is there no implied request of the defendant to advance the money; in the case of a co-surety there is, his promise being that, if his companion will pay the amount for which they are jointly liable, he will repay him a ratable proportion of it. Indeed, in the case of Craythorne v. Swinburne, 14 Ves. Jr. 165, Lord Eldon appears to think that the right of a surety to call on his co-surety for contribution depends rather on a principle of equity than of contract.

Then it is said that there is no authority for this form of action by a co-surety; but I find there are at least three cases in which it has been maintained. The first is that of Cowell v. Edwards, 2 B. & P. 268, in which the Court of Common Pleas admitted that the action would lie in this form, and said that it was, perhaps, too late to dispute the point. Then there is the case of Browne v. Lee, 6 B. & C. 689, which was an action in the present form against a co-surety, in which the Court of Queen's Bench said that, at law, one of three sureties could recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of the sureties. And, lastly, there is the case in this court of Davies v. Humphreys, in which the court took a great deal of pains to look into the authorities on the subject, and understood, all throughout the case, that an action for money paid would lie against a co-surety by his companion. Then, if the plaintiff is entitled to recover at all, the case of Browne v. Lee is an authority to show that he is entitled to recover one-third of the principal; and I do not see why he should not also pay his proportion of the costs of enforcing the warrant of attorney, for they were incurred in a proceeding against both the sureties, in respect of a debt for which they were jointly liable on the default of the principal.

With respect to the last objection, I do not think it ought to be allowed to prevail. The plaintiff has a very honest case against the defendant, for he has advanced money on his account, and it would be most unjust to allow the defendant to set aside the warrant of attorney at this stage of the proceedings, after a trial has taken place. The defendant should have come with this objection long ago.

ALDERSON, B. The judgment of the Court of Queen's Bench in Spencer v. Parry, 3 Ad. & Ell. 331, seems an authority against the defendant. Look at the principle which is there laid down by Lord Denman, C. J.: "In the case which has been cited, of Brown v. Hodgson, 4 Taunt. 289, the plaintiff, a carrier, having by mistake delivered A.'s

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goods to B., who made them his own, paid A. the price and was afterwards allowed to recover it from B., as money paid to his use. But this was, in fact, money paid to his use, for it was in discharge of his debt to A.; and it may be fairly said to have been paid at his instance, because he knew that the plaintiff's mistake, in delivering the goods to him, made the plaintiff liable to pay the price to the true owner." That establishes the principle that, where a man pays to a third person money which that third person might have recovered against the defendant, it is money paid to the use of the defendant. Try the present case by that test. Is not this a payment of money which the defendant would otherwise have been liable to pay, and so, in discharge of a debt, according to the language of Lord Denman? This reasoning does not apply in the case of a guarantee, for there is no original liability to a third party.

As to the second point, this case is exactly the same as if these parties had been sureties for a firm consisting of five or six individuals; the principals not having paid, the co-surety is liable for his half. As to the costs, the judgment on the warrant of attorney is entered up against four; i. e., the two principals and the two sureties. If one of the latter pays the whole amount of those costs, his companion is bound to pay his share.

As to the last objection, relative to the attestation of the warrant of attorney, the entertaining it now would not be "summi juris," but "summissimi juris."

Rule refused.

SLOO, Adm'r of Castles, v. POOL.

(Supreme Court of Illinois, 1853. 15 Ill. 47.)

Error to Gallatin.

This cause was heard at October Term, 1853, of the Gallatin Circuit Court, before Marshall, Judge.

TREAT, C. J. In July, 1841, Robert Castles, as principal, and William Castles and Orval Pool, as sureties, executed a joint and several promissory note to the Bank of Illinois. In August, 1852, Pool paid the note in full. William Castles was dead, and his administrator had been qualified more than two years. On the 5th of October, 1852, Pool filed a claim in the county court against the estate of William Castles, for contribution on account of the payment of the note. The administrator did not file an inventory of the real estate of William Castles until the 1st of November, 1852. The county court disallowed the claim, and the case was removed into the circuit court. That court rendered judgment against the administrator for one-half of the amount paid by Pool, to be discharged in due course of administration, out of any assets discovered subsequent to the 5th of October, 1852. It did not appear whether Robert Castles was solvent or not.

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It is insisted that a surety cannot enforce contribution from a co-surety, without showing the insolvency of the principal. This may be the doctrine of courts of equity, but it is not the rule at law. In Cowell v. Edwards, 2 Bos. & Pull. 268, Lord Eldon expressed the opinion that a surety might maintain an action for contribution against a co-surety, without proving the insolvency of the principal debtor; and that opinion does not appear to have been questioned in the English courts. It has been followed in this country in the cases of Odlin v. Greenleaf, 3 N. H. 270, Roberts v. Adams, 6 Port. (Ala.) 361, 31 Am. Dec. 694, and Judah v. Mieure, 5 Blackf. (Ind.) 171. The Kentucky courts hold that a surety cannot compel contribution unless the principal is insolvent. But the rule laid down by Lord Eldon is best supported by authority, and more consistent with legal principles. Sureties are individually liable to the creditor. But one is as much bound to discharge the debt as another. If the creditor endeavors to enforce payment from them, it is, as between themselves, the duty of each to pay an aliquot portion of the debt. If that is not done, and one is compelled to pay the whole, he is entitled to contribution from the others in the same proportion. The law implies an agreement between them, when they become responsible to the creditor, that if one shall be compelled to pay the debt the others will contribute so as to make the burden equal. If one pays the whole debt, he has a cause of action against the others, to recover their just proportions, as so much money paid to their use. His right to contribution is complete as soon as he pays the debt; and he may at once call upon his co-sureties to bear the common burden with him.

At law, he cannot sue two or more sureties jointly; but he must sue each separately. And he can only recover from one an aliquot proportion of the debt, to be ascertained by the number of sureties, without regard to their solvency. But in equity, relief is granted between sureties on the principle of equality applicable to a common risk; and if one of them is insolvent the loss is apportioned among the others. 1 Story, Eq. 496; Chitty on Cont. 471; Theobald on Principal and Surety, 196. In the present case, the sureties were individually liable for the debt. The bank might have sued either of them separately, and compelled him to pay the entire debt; but, as between themselves, each was bound to pay one-half of the note. Pool advanced a moiety for the use of the estate of his co-surety; and he was clearly entitled to a judgment against the administrator for that amount, without any reference to the ability of the principal.

As Pool did not exhibit his claim within two years from the grant of letters of administration, he is precluded by the statute of limitations from any participation in that portion of the estate of William Castles which was inventoried or accounted for by the administrator during that period. His judgment can only be satisfied out of estate discovered or inventoried after the expiration of the two years. Thorn v. Watson, 5 Gilman, 26; Judy v. Kelley, 11 Ill. 211, 50 Am. Dec.

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455; People v. White, 11 Ill. 341. The statute makes it the duty of an administrator, within three months after his appointment, to return to the probate court a full and perfect inventory of the real and personal property of the intestate. Rev. St. c. 109, § 81. The administrator of William Castles did not return an inventory of the real estate within two years from the grant of administration. The real estate was therefore not inventoried or accounted for during that period of time; and Pool is consequently entitled to participate equally with the other creditors in the proceeds thereof. He is also entitled to share in the proceeds of any personal estate discovered or inventoried after the expiration of the two years.

The court erred in confining Pool, in the satisfaction of his judgment, to assets discovered or inventoried subsequent to the filing of the claim. But this error cannot operate to the prejudice of the administrator. Pool alone has reason to complain. Judgment affirmed.[3]

ACERS v. CURTIS.

(Supreme Court of Texas, 1887. 68 Tex. 423, 4 S. W. 551.)

WILLIE, Chief Justice. Curtis brought this suit against the firm of Brannon Bros., and also against H. Eddy, A. S. Mercer and the appellant, C. F. Acers. He alleged that he and the three last named defendants were sureties on a note which they together with Brannon Bros. executed to George W. West for $2,842.60, which note bore interest at the rate of 12 per cent. per annum, and in case of legal proceedings 10 per cent. attorney's fees on the amount of the note was to be collected from the makers. The note matured on the 15th of October, 1884, and payment was not made, though demanded of the makers, whereupon Curtis paid the note and had it indorsed to himself. When paid the note amounted to $3,193.17, principal and interest, and this sum was paid to the payee by the appellee Curtis. Brannon Bros. were insolvent at the maturity of the note and at the commencement of the suit. Curtis claimed that his co-sureties were bound to pay him their pro rata of the above sum, with interest and 10 per cent. attorney's fees, viz., $319.31. He prayed for such judgment as he was entitled to under the allegations of his petition.

Citation issued upon this petition, and was served upon all the defendants except A. J. Mercer, as to whom it was returned "not found." He was alleged in the petition to be a resident of Cheyenne, Wyoming Territory. No answer was filed, and judgment was rendered for plaintiff, reciting that all the defendants had been duly served with citation and had failed to appear. This judgment was against Brannon Bros. for the sum of $3,691, to bear interest at 12 per

[3] Contra: Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92 (1838).

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cent. per annum, and, in case this could not be made out of the other parties, against the other defendants for the sum of $2,792.41, which was said to be their pro rata of the amount paid by Curtis upon the note. This, too, was to bear interest at 12 per cent. per annum. From this judgment Acers prosecutes a writ of error to this court.

It is apparent that the recovery given to Curtis against his co-sureties was three-fourths of the amount due on the note at the date of the judgment, with attorney's fees added. The appellee was not entitled to such a judgment under the allegations of his petition. He was one of four co-sureties on the note. When he paid it he became entitled to contribution from each of his co-sureties in aliquot parts according to their number; that is to say, one-fourth of the amount paid, with interest, from each surety. Morrison v. Poyntz, 7 Dana (Ky.) 307, 32 Am. Dec. 92; Stothoff v. Dunham, 19 N. J. Law, 182.

He was not entitled to recover the whole three-fourths from those sureties in a joint judgment against them. The injustice of such a judgment is apparent from the fact that the whole of it could be made out of one defendant, and in case of the insolvency of the others this defendant would be forced to pay three times the amount the plaintiff was entitled to recover of him. The rule in equity in case of such insolvency is that the solvent sureties bear equally the burden of payment. This rule, as well as that which requires all the sureties, when solvent, to share equally in the payment, is violated by the present judgment. Powell v. Matthis, 26 N. C. 83, 40 Am. Dec. 427; Henderson v. McDuffee, 5 N. H. 38, 20 Am. Dec. 557.

Nor can we perceive upon what principle the plaintiff recovered 10 per cent. attorney's fees of the defendant sureties. He had not paid attorney's fees to the owner of the note. They were not to be paid except in case of suit, and it does not appear that any suit had been commenced on the note when he took it up. He says that he was forced to pay it, but the inference is that this was by reason of the insolvency of the makers. At all events, he paid no attorney's fees, and was entitled to recover contribution only for what he did pay. A surety cannot speculate off of his co-sureties.[4] If he purchases the note for less than its face value, they are entitled to share in the benefits of the bargain; much less can he get from them a pro-

[4] The reason against speculation is thus clearly set forth in Tarr v. Ravenscroft et al., 12 Grat. (Va.) 653, 654 (1855): "In Blow v. Maynard, 2 Leigh, 29, it was held that, where a surety for a guardian compromised with the ward for a less sum than was actually due on a settlement of the guardian's account, he could only demand indemnity from the guardian's estate in equity for the money actually paid to the ward in satisfaction of her claim. A fortiori, it should seem he could not demand contribution of a co-surety except for the amount thus actually paid. If the principal be only liable for the amount actually paid by a surety in discharge of the debt, then he could only be liable to any other surety for his quota of that amount; and if the latter could be called on for contribution according to the nominal amount of the debt, he would thus be liable to his co-surety for a greater amount than he could recover of the common principal."

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portionate share of the face value, if he pays the note in full. From this it is apparent that the judgment below was error. It was not authorized by the pleadings, and hence could not be rendered, though no appearance was made for the defendants. This view of the judgment relieves us of the necessity of passing upon the question as to whether or not it could be sustained against Mercer, who was not served according to the sheriff's return, but was according to the recitals of the judgment. It is not probable that a recovery will be attempted again as to Mercer, without bringing him into court in some manner recognized by our statutes.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.[5]

CHIPMAN v. MORRILL & WEBSTER.

(Supreme Court of California, 1862. 20 Cal. 130.)

Appeal from the Fourth Judicial District.

This action was commenced on the 30th day of July, A. D. 1860. All other material facts are stated in the opinion of the court.[6]

FIELD, C. J., delivered the opinion of the court; NORTON, J., concurring.

The property of the plaintiff was sold under execution to satisfy a judgment recovered against the plaintiff and the defendants, and this action is brought to enforce payment from the defendants of their proportionate share. The questions for determination arise upon the pleadings. The papers read on the motion for new trial we cannot look into, as there is no appeal from the order denying the motion. The complaint sets forth that in December, 1853, the plaintiff and the defendants purchased certain real estate situated in Alameda county, and gave to the vendor in part payment for the same their joint promissory note for $11,666, secured by a mortgage upon the property; that the plaintiff by the purchase became the owner of one undivided half of the premises, and each of the defendants became the owner of one undivided fourth; that the note was not paid, and that suit was commenced for the foreclosure of the mortgage, in which judgment was recovered against the plaintiff and the defendants for

[5] On the subject of joint judgments, cf. Cummings v. Little, 45 Me. 183 (1858).

As the surety has no right to contribution until payment of more than his share, he has likewise no right of contribution or subrogation against his co-surety if he pays the debt before it is due. Felton v. Bissel, 25 Minn. 15 (1878).

On subrogation between co-sureties, applied so as to permit the paying surety to prove note against co-surety's insolvent estate, though entitled to receive dividends to only half its amount, see 12 H. L. R. 284.

[6] The arguments of counsel are omitted.

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$11,666, and a decree entered directing the sale of the premises for the satisfaction of the judgment; that under the decree the mortgaged premises were sold, and after the application of the proceeds to the payment of the amount due upon the judgment there remained a deficiency of $8,040; that for this deficiency, and the percentage, interest and costs, an execution was issued on the 1st of July, 1856, and under it, on the 30th of the same month, property of the plaintiff was sold for the sum of $12,000, and the amount applied to the satisfaction of the deficiency and interest, percentage and costs; that the deficiency was due from the plaintiff and defendants in the same proportions between themselves, as they were the purchasers and owners of the premises—that is, one-half from the plaintiff and one-fourth from each of the defendants; but, as the whole amount was paid by the plaintiff, the defendants are bound to make contribution to him in proportion to their interests. Then follows a prayer for judgment that each defendant be required to pay the plaintiff the sum of $3,000, with interest from July 30, 1856, and for such other and further relief as to equity shall seem meet.

To this complaint the defendant Webster demurred on various grounds, and among others on the ground that there was a misjoinder of parties, because the cause of action was several against each of the defendants, and on the ground that it appeared that more than two years had elapsed from the time the cause of action accrued before the suit was commenced. The court sustained the demurrer, and, the plaintiff declining to amend his complaint, final judgment was entered thereon.

The defendant Morrill answered, denying, to use the language of his answer, "the greater part of the allegations of the complaint," without stating what those allegations were, and setting up, or rather attempting to do so, the statute of limitations and a discharge under the insolvent law of the state. The plaintiff, instead of demurring to the defective answer, filed a replication to it, denying the bar of the statute and the discharge in insolvency. The case was then submitted upon the pleadings. Upon them the court gave judgment for the defendant. It is from these two judgments—one in favor of the defendant Webster on the demurrer, and the other in favor of the defendant Morrill on the pleadings—that the appeal is taken.

The appellant in his argument of the appeal takes two positions: First, that the action is one in equity to enforce a contribution from two of three obligors, to which the statute does not create a bar until after the lapse of four years (Act April 22, 1850, § 19, defining the time for commencing civil actions); and, second, that if the action be regarded as depending upon contract, that such contract is founded upon an instrument of writing, and to the action the statute in consequence fixes a like limitation of four years.

1. In support of the first position, the appellant cites various authorities upon the doctrine of contribution as between co-sureties, to

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the effect that such doctrine depends more upon a principle of equity than upon contract. Such is undoubtedly the case as between co-sureties, and the principle is that, where there is a common liability, equality of burden is equity. Courts of equity, therefore, naturally took jurisdiction of cases of contribution, where one surety had paid more than his just proportion. But the equitable doctrine, in progress of time, became so well established that parties were presumed to enter into contracts of suretyship upon its knowledge, and consequently upon a mutual understanding that, if the principal failed, each would be bound to share with the others a proportionate loss. Courts of common law thereupon assumed jurisdiction to enforce contribution between the sureties, proceeding on the principle that from their joint undertaking there was an implied promise on the part of each surety to contribute his share, if necessary, to make up the common loss. Craythorne v. Swinburne, 14 Vesey, 164; Lansdale's Administrators and Heirs v. Cox, 7 T. B. Mon. (Ky.) 403; Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 339, 8 Am. Dec. 570; 1 Maddock's Ch. 236; Fletcher v. Grover, 11 N. H. 369, 35 Am. Dec. 497. This jurisdiction of the common-law courts did not, however, impair the concurrent jurisdiction of equity. Indeed, in many cases, especially where the sureties were numerous, and some of them were insolvent, or where some of the sureties had died, courts of equity were alone adequate to afford complete remedy. Wright v. Hunter, 5 Vesey, 194; Wayland v. Tucker, 4 Grat. (Va.) 268, 50 Am. Dec. 76; Couch v. Terry's Adm'rs, 12 Ala. 228.

It is also true that the doctrine of contribution applies equally between those who are original co-contractors (that is, between those who are jointly bound on their own account, not being co-partners) as it does between those who are co-sureties (that is, jointly bound to answer for the debt or default of another). Thus, if a note were given for the cost of a partition wall by the owners of the adjoining premises, between which the wall was constructed, and one of the parties should pay the entire amount of the note, or more than his proportionate part, he could claim a contribution from the other. Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 335, 8 Am. Dec. 570.

But the present case is not one for contribution between parties who have sustained a common loss upon a common liability. The note of the plaintiff and defendants, upon which the judgment was rendered, was given upon the purchase of real estate in which the parties took separate and distinct interests—the plaintiff one undivided half, and each of the defendants one undivided fourth; and between themselves the obligation of each was to pay for his respective interest. In giving their joint note for the whole amount of the purchase money, each party was principal for the amount of his own interest, and co-surety for the remaining interests. Thus the plaintiff was principal for one-half of the purchase money, and co-surety with Webster for one-fourth of the same for Morrill, and co-surety with Morrill for one-fourth

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for Webster. Goodall v. Wentworth, 20 Me. 322. When, therefore, the plaintiff paid the entire amount of the judgment recovered upon the note—or, what is the same thing, when the proceeds of the property of the plaintiff sold under execution were applied to such payment—he became entitled to maintain an action against the defendants for moneys paid on their account. The demands which he could then assert were several in their character. They were demands, not for contribution, but for reimbursement of moneys paid. The action should, therefore, have been against the defendants separately, upon the assumpsit which the law implies where a surety is compelled to advance money for his principal. Parker v. Ellis, 2 Sandf. (N. Y.) 223; Odlin v. Greenleaf, 3 N. H. 270; Mauri v. Heffernan, 13 Johns. (N. Y.) 59; Lapham v. Barnes, 2 Vt. 213; Fraser v. Goode, 3 Rich. Law (S. C.) 199; Babcock v. Hubbard, 2 Conn. 536; Ward v. Henry, 5 Conn. 596, 13 Am. Dec. 119.

2. The action being upon the implied assumpsit, the question is whether the contract is to be regarded as "founded upon an instrument of writing." The statute provides that "an action upon any contract, obligation or liability founded upon an instrument of writing," except in certain designated cases, shall be commenced within four years, and an action upon a contract, obligation or liability not thus founded, with certain exceptions, shall be commenced within two years. The question is whether the present action is, in the meaning of the statute, "founded upon an instrument of writing." Our conclusion is that it is not thus founded; that the statute by the language in question refers to contracts, obligations or liabilities resting in, or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations or liabilities. The construction would be the same if the word "founded" were omitted, and the statute read "upon any contract, obligation or liability upon an instrument of writing." Such being our construction, we are of opinion that the statute created a bar to the present action after the lapse of two years from the 30th of July, 1856. The demurrer interposed by the defendant Webster was, therefore, well taken. One of the questions raised by the defendant Morrill, by his defective answer, also related to the bar of the statute. Although informally taken, the objection, supported as it is by the allegations of the complaint, was sufficient to uphold the judgment rendered.

Judgment affirmed.

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DURBIN v. KUNEY & SAYERS.

(Supreme Court of Oregon, 1890. 19 Or. 71, 23 Pac. 661.)

Appeal from Marion county: R. P. Boise, Judge.

This action was brought against the defendants for contribution. The facts are in substance these: On the 15th day of August, 1879, the plaintiff, Durbin, and the defendants Kuney & Sayers, parties to this action, gave two promissory notes of that date to R. M. Wade & Co., each for $162.50, due in 3 and 15 months after date, respectively, and signed by all the parties, in payment for a harvester purchased by them, and that the plaintiff, Durbin, paid off both notes as follows: On September 24, 1881, he paid R. M. Wade & Co. $203.63, the amount then due on the three months' note; on May 20, 1883, he paid R. M. Wade & Co. $80; September 6, 1886, $59.15; November 3, 1887, $116.10, which constitute the various sums paid on the other note and judgment which was rendered against the parties.

As one cause of defense, the defendant Sayers pleads that the note paid off on September 24, 1881, by the plaintiff, Durbin, is barred by the statute of limitations. A motion was made to strike out this defense, which was overruled by the court, and on the trial of the cause the court gave the following instructions, to which exceptions were taken: "If plaintiff has paid off and taken up one of the notes in the complaint, more than six years before the commencement of this action, he cannot recover in this action any of the money so paid on that note, because a cause of action accrued at the time of such payment and expired by the statute of limitations before commencement of this action; that if the statute of limitations has run against one note, that note is out of this case; and that the utmost that the plaintiff can recover in that event would be one-half of the money paid on the other note."

LORD, J., delivered the opinion of the court.[7] * * *

According to the facts, at the time when the plaintiff paid the $203.63, he only paid one-half of the whole debt, and it is indisputable, if the defendants had paid the other half, that the plaintiff would have no right of contribution, and therefore he had not paid more than his proportion, and until then a right to contribution cannot arise. And as the statute of limitations does not begin to run until the plaintiff has paid more than his proportion of that debt, it did not begin to run when he paid the sum of $203.63. His right of contribution is not measured by nor founded upon the notes, but on the payment of more than his proportion of the debt which the notes represented. He is not substituted to the place of the creditor, and seeking relief on that basis, for in that case the instruction might be correct, but his equity springs

[7] Only that part of the opinion of the court dealing with the statute of limitations is printed.

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out of the debt as to which he and the defendants stand equati jure and must bear the burden equally.

We think, therefore, the instructions were erroneous statements of the law as applicable to the facts, and the judgment must be reversed and a new trial ordered.[8]

ROBINSON'S EX'RS v. KENON'S EX'RS.

(Superior Court of North Carolina, 1802. 3 N. C. 181.)

JOHNSTON, Judge. This is an action by one surety against another to recover a proportion of the monies paid for the principal. There is no case to support such an action. That such action is not supportable was lately decided at Hillsborough. The plaintiff must resort to equity for a contribution or reimbursement.

Quere de hoc et vide 2 Bos. & P. 368 to 274.[9]

LABBE v. BERNARD et al.

(Supreme Judicial Court of Massachusetts, 1907. 196 Mass. 551, 82 N. E. 688, 14 L. R. A. [N. S.] 457.)

Bill in equity by a surety against his co-sureties for contribution, filed in the superior court for the county of Bristol, August 14, 1907.

A demurrer to the bill was sustained by White, J., and the plaintiff appealed. The material allegations in the bill are stated in the opinion.

SHELDON, J. The plaintiff and the defendants were co-sureties upon a bond given by one Rodgers, for the performance of an agreement made by him to grade some land for a third party for a fixed price. Rodgers entered upon the performance of the contract and completed a little more than one-half of the work, received a part of the agreed price, and then abandoned the contract and absconded. Thereupon the plaintiff as one of the sureties of Rodgers finished the work, at an expense of more than $800, and either received or became entitled to receive from the third party a sum slightly above this, being the balance of the contract price over what had been paid to Rodgers. The plaintiff now seeks by his bill to compel the defendants to contribute ratably to the amount thus paid by him to complete the work called

[8] But if the plaintiff surety made payments in excess of his moiety more than six years before the bringing of his action, the statute began to run from the time he had so paid in excess of his share; and hence his action for contribution in respect to payments so made more than six years prior to suit would be barred. Davies v. Humphreys, 6 M. & W. 152 (1840).

[9] Accord: Carrington v. Carson, 1 N. C. 410 (1802). But now, by the act of 1807 (1 Rev. St. c. 113, § 2), one surety may have an action at law against his co-surety.

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for by the contract, without giving any credit for the amount which he received for doing it.

If these were all the facts, it is sufficiently manifest that the bill could not be maintained. When the sureties should be called upon to make good the default of Rodgers and should complete the work which he ought to have done, they would become subrogated to all his rights under the contract and entitled to receive whatever part of the contract price had not been paid to him. And the plaintiff, having alone completed the work and received what remained due of the contract price, might indeed charge against his co-sureties, ratably with himself, the cost of completing the work, but he must give like credit for the amount which he received therefor. Whatever he received by reason of his suretyship, whatever security or advantage he derived from the work done in consequence of his suretyship upon this obligation, he must apply to the relief of his co-sureties as well as to his own relief. New Bedford Institution for Savings v. Hathaway, 134 Mass. 69, 75, 45 Am. Rep. 289; Kelly v. Page, 7 Gray, 213, 214; Bachelder v. Fiske, 17 Mass. 464; Owen v. McGehee, 61 Ala. 440; Stanwood v. Clampitt, 23 Miss. 372; Arcedeckne, In re, 24 Ch. D. 709; Steel v. Dixon, 17 Ch. D. 825.

But the plaintiff's bill avers also that, after Rodgers had begun the work and before he abandoned it, he borrowed money of the plaintiff to enable him to carry it on, and as security therefor assigned to the plaintiff all his claims and demands under the contract. And the plaintiff claims that while he completed the work as a surety and so is entitled to call upon his co-sureties to share the expense thus incurred, he was entitled to the price received therefor as assignee of Rodgers, and so need not bring this into the account for the benefit of the defendants. In our opinion this contention cannot be maintained.

While it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right became an inchoate one as soon as they have entered into the relation of suretyship; and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, relates back, as against each other and their principal, to that earlier time. Rice v. Southgate, 16 Gray, 142; Lewis v. Faber, 65 Ala. 460; Wood v. Lake, 62 Ala. 489; Conner v. Howe, 35 Minn. 518, 29 N. W. 314; McArthur v. Martin, 23 Minn. 74; Forbes v. Jackson, 19 Ch. D. 615. And all persons who have in the meantime received any securities or payments from either party to the principal contract, with notice of the facts and of the surety's responsibilities and consequent rights, must in equity hold them for his benefit. Norton v. Soule, 2 Greenl. (Me.) 341; Atwood v. Vincent, 17 Conn. 575; Green v. Ferrie, 1 Desaus. (S. C.) 164; Drew v. Lockett, 32 Beav. 499. The plaintiff being himself one of the sureties and having full knowledge of all the facts it is unnecessary to consider what would

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have been his rights if he had taken his assignment without notice of the equitable rights of his co-sureties.

Exactly the doctrine here stated was declared under a very similar state of facts by the Supreme Court of the United States in Prairie State National Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, and by the Circuit Court of Appeals in First National Bank v. City Trust Co., 114 Fed. 529, 52 C. C. A. 313, in each of which cases the contest was between the original sureties upon a building contract and a subsequent assignee from the contractor. It was enforced against the trustee in bankruptcy of the contractor in favor of his sureties on the original contract in Reid v. Pauly, 121 Fed. 652, 58 C. C. A. 152. The dissenting opinion of McKenna, Circuit Judge, in First National Bank v. City Trust Co., ubi supra, and the decision in Dowling v. Seattle, 22 Wash. 592, 61 Pac. 709, which are the strongest utterances we find against the full extent of the doctrine stated, recognize the right of the sureties of the contractor, as against his assignee in such a case, to hold all the money which has been earned after they have undertaken the work which the contractor has abandoned, and accordingly do not help the plaintiff here. The cases which the plaintiff has cited in support of the well-recognized doctrine that a surety who has received from the principal debtor security originally given for another debt due to himself alone, as well as to protect the principal obligation, may apply such security for his own protection wholly, are not applicable and need not be considered.

The case may be stated more succinctly, but with sufficient fullness in another way. If as the plaintiff claims in his bill he completed the work as a surety of the original contractor, he must be held to have received the compensation in the same character; if, as he has argued to us, he received the compensation as assignee of the contractor then he cannot claim against the defendants to have done the work as a surety. In neither event has he sustained any loss to which he can require his co-sureties to contribute.

The decree of the superior court sustaining the demurrer and dismissing the bill with costs must be affirmed; and it is

So ordered.[10]

LAWSON v. WRIGHT.

(Court of Chancery, 1786. 1 Cox, Ch. 275.)

The tolls of a turnpike gate having been put up to sale, George Watson became the purchaser, and upon that occasion agreed with the commissioners to pay a sum of £320. by installments of £20. each, at times specified in the cause; and Thomas Wright and George

[10] Accord: Malone v. Stewart, 66 Legal Intelligencer, 611 (Nov. 12, 1909).

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Wright became jointly and severally bound with the said George Watson for such payments at the expiration of the time within which the installments were to be paid. George Watson was a defaulter for £100., whereupon the bond was put in suit against Thomas Wright, and he actually paid the money, after which, the said Thomas Wright being dead, the present bill was filed by his executors against George Wright, the co-surety, and the said George Watson, the principal, stating George Watson to be insolvent, and praying a contribution from the said George Wright, but praying no relief against Watson. His honor was very clear on the general equity of the case, and said it had been established, ever since the origin of courts of equity, that one surety had a right to call on another for contribution in cases of this nature; but his honor had some doubts whether it was not absolutely necessary to prove the insolvency of the principal, which was not done in the present case.

To which objection it was answered, by the counsel for the plaintiff, that although such was the rule where the principal was not before the court, yet the principal being here a defendant, it was competent to the court to make such a decree, as it could at the same time direct payment from the principal to the co-surety, and it was also suggested that there might be a difference in the case, where the money had been actually paid by one surety, and where the bill was only under apprehensions of plaintiff being called upon on account of the insolvency of the principal, and that though in the latter case it would be clearly necessary to prove the principal's insolvency, it might not be necessary in the former; but his honor relied on the circumstance of the principal being a defendant, and decreed that an account should be taken of the money paid by Thomas Wright in respect of the matters aforesaid, and that one moiety thereof should be answered by the defendant George Wright to plaintiff, together with one moiety of plaintiff's costs, and that George Wright should recover over such moiety of the money and costs, together with his own costs from the defendant George Watson.

The decree was that it should be referred to the master to take an account of all sums of money paid by Thomas Wright, deceased, and the plaintiff Ann Lawson and Thomas Wright, his executors, or any of them, agreeably to the undertaking in the pleadings mentioned, and compute interest on such sums of money at the rate of 4 per cent. from the times the several payments were made, and to tax the plaintiff the costs of the suit. And it was further ordered that the defendant George Wright did pay unto the plaintiffs one moiety of what should be found for principal and interest as aforesaid, together with the costs of this suit. And it was further ordered that the defendant George Watson did pay unto the plaintiffs the other moiety of what should be found for principal and interest as aforesaid, and did also pay to the defendant George Wright the principal and interest before directed to be paid by him to the plaintiffs, together with the costs of

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the said defendant George Wright, and also the costs which he should pay to the plaintiffs under the direction before given. Reg. Lib. B. 1786, fol. 81.

HARRISON v. LANE.

(Court of Appeals of Virginia, 1834. 5 Leigh, 414, 27 Am. Dec. 607.)

This case, as it appeared in proof, was thus: William Lane having been appointed sheriff of the county of Fairfax, James Wigginton made application to him for the office of deputy, and offered to give him a bond for the faithful discharge of the office, with five sureties, namely Hedges, Hayes, Wagoner, Purcell, and the appellant, Harrison. Lane being, at the time, satisfied with the sufficiency of the surety Harrison, though he had no confidence in Wigginton's solvency, or in that of the other sureties, agreed to appoint Wigginton his deputy, upon the due execution of an official bond by him and the five sureties he had named; and the bond was accordingly prepared, executed by Wigginton and the four first named sureties, and a sixth seal put to it for Harrison, and then sent by Lane to Harrison to be by him executed; and Harrison did execute it by signing his name opposite the sixth seal. The bond, thus executed, was delivered to Lane, and he thereupon admitted Wigginton as his deputy; but after Wigginton had been in the office a short time, Lane, apprehending that all the sureties but Harrison were in doubtful or insolvent circumstances, insisted that Wigginton should give him additional security for the faithful execution of the office, in consequence of which, Wigginton, with Hancock, Waugh and Blackburn, as his sureties, executed another bond to Lane. This second bond was the same in form with the first bond; that is, both were in the usual form of a deputy sheriff's official bond to his principal. But on this second bond there was a memorandum, indorsed and signed by Lane, expressing that it was expressly understood that in case Wigginton should be delinquent, and Lane should be obliged to proceed against his sureties for indemnification, he (Lane) would not "execute the sureties in this bond," so long as the sureties in the first bond should be resident in the state, and it should appear that he could be completely indemnified without resorting to the sureties in the second bond. And it was proved, by parol evidence, that this memorandum on the second bond was executed at the same time with the bond, and that the memorandum was made by Lane in conformity with a previous agreement between Wigginton and the sureties, Hancock, Waugh and Blackburn, on the one part, and Lane on the other.

Wigginton was then permitted by Lane to continue in the office of deputy, in which he committed many acts of official misconduct, for which Lane was sued, and several judgments were recovered against him; and Lane brought suits against Wigginton and his sureties in the

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first bond, and recovered judgments against them for the amounts adjudged against himself on account of Wigginton's defaults; but before these judgments were recovered by Lane, Wigginton and all the sureties bound in the first bond, except the appellant, Harrison, had become insolvent, so that the whole burden fell upon Harrison alone.

Harrison then exhibited a bill, in the superior court of chancery of Richmond, against Lane and Hancock, Waugh and Blackburn, the sureties bound in the second bond, alleging that Lane, when Wigginton offered the persons named in the first bond for his sureties, was well apprised that all of them were insolvent but Harrison, and induced Harrison to join in that bond by concealing the fact from him, and by representing to him that other good sureties would also become bound for Wigginton; that when Wigginton tendered him the first bond, fully executed by the parties, he refused to receive it and required another bond with other sufficient sureties; that the second bond was executed in consequence of this requisition, and the design of it was, either that it should be a substitute for the first bond, or that the sureties in the second bond should stand equally and jointly responsible with those bound in the first, for all the acts of Wigginton in his office of deputy sheriff; that Lane would not permit Wigginton to exercise the office of deputy till the second bond was executed, and it was upon the security of that bond alone that Wigginton was admitted as his deputy; that the memorandum indorsed on the second bond was executed some time after that bond was delivered, and thus Lane attempted to alter the obligation incurred by the sureties therein bound; and that Lane, having absolutely rejected the first bond, had, in truth, no right to hold it. Therefore the bill prayed an injunction to inhibit Lane from executing his judgments at law against Harrison; and, if it should appear that Lane was entitled to the benefit of those judgments against Harrison, that Hancock, Waugh and Blackburn should be compelled to make equal contribution with him for the satisfaction thereof.

The injunction was awarded. The defendants answered, showing the facts of the transaction as above stated, and denying all the allegations of the bill variant from that state of the case. And the evidence filed in the cause, in the opinion of the chancellor and of this court, instead of substantiating the allegations of the bill, proved the truth of the answers.

The chancellor dissolved the injunction and dismissed the bill, with costs; from which decree, this court, upon the petition of Harrison, allowed him an appeal.

CARR, J. I am of opinion that the chancellor was right in dissolving the injunction. Whether he ought ever to have granted it, is a much more doubtful question. The doctrine of contribution between co-sureties has been much discussed. It is clear that if different persons are sureties for the same debt, or for the performance of the same duties, each will be made, in equity, to contribute, though they

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be bound by different bonds, and though they knew nothing, at the time, of the obligations of each other. But then they must be sureties to the same extent, and for the same debt or duty. It is equally clear that if there be one set of sureties bound for a debt, and then the obligee takes another bond as collateral and supplemental security, these last obligors binding themselves to pay if the principal and sureties in the first bond fail, this bond will bind them no further than they have contracted. This is of the very essence of the contract; and the case of Craythorne v. Swinburne, 14 Ves. 160, is express to this point.

Nor is the taking such second bond a fraud upon the obligors in the first. It does not increase their burden, or any way change their situation. They agreed each to execute the bond, and look to their principal and associates for safety. What is the case here? Wigginton applied to Lane to become his deputy, and stated that he could give certain sureties. Lane agreed to take the bond with those sureties. The bond was prepared with the six names in the body, Harrison's last, and with six seals. It was executed by the other five, and in this situation was presented to Harrison. Nothing was said to him of additional sureties. The very form of the bond showed him that he was the last to execute it. He did execute it, and thereby bound himself jointly and severally with the others, to be liable for all defaults of the deputy. Notwithstanding this, I admit that if another bond had been afterwards taken, with other obligors bound for the same thing and in the same manner, Harrison, on paying money for the deputy's delinquencies, would have had a right to call on these subsequent sureties for contribution.

But, in the case before us, there is the most satisfactory proof that the memorandum indorsed on the second bond, showing that this bond was a supplemental security, formed a part of the agreement on which the bond was signed, and was executed at the same time. This memorandum is a part of the bond, as well as of the agreement, and must be taken as if incorporated with it. Even if there had been no memorandum, parol proof of the agreement (of which there is enough in the record) ought, I think, to have been received, and for this the case before cited is express authority.

I am clear, therefore, that the decree should be affirmed.

CABELL, J. If the sureties in the second bond were bound for the same thing for which the sureties in the first bond were bound, they would be liable to contribution, although their engagement was made at a subsequent time, by a different instrument, and even without the knowledge of the first bond. But the memorandum indorsed on the second bond is to be considered as a part of the bond itself; and the bond, thus modified, shows clearly that they were bound for a different thing. They did not, like the sureties in the first bond, bind themselves absolutely for all the acts of Wigginton, but for such only as the sureties in the first bond should fail to make good. This is proved, also,

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by the parol testimony, which is admissible in a case like this. The sureties in the second bond were not, therefore, co-sureties with the sureties in the first, but were sureties for them. The doctrines of the law, on this point, are well explained in Craythorne v. Swinburne.

The decree should be affirmed.

TUCKER, P. The appellant asks, upon the facts set forth in this bill, relief against the sheriff, or a decree for contribution against the sureties in the second bond. If, as is alleged, the memorandum on that bond was executed at the time the bond itself was entered into, it is difficult to perceive upon what principle the plaintiff can expect to charge the sureties therein bound. The doctrine of contribution, it is true, may extend to parties who are bound by different instruments, provided they are all sureties for the same person and the same thing. But it does not therefore follow that, by the very terms of their engagement, the sureties in a separate bond may not make themselves responsible only sub modo, and place themselves out of the reach of the principle of contribution. "Whether," says Lord Eldon, "contribution depends upon a principle of equity, or is founded in contract, it is clear a person may, by contract, take himself out of the reach of it." "The question is, Whether the meaning of the instrument is that the party will be a co-surety, or that the surety in the former instrument is to be considered a principal." "If the party, not constituting himself co-surety, engages only to pay if the creditor cannot get payment from the other sureties, he withdraws himself by his contract from the reach of the principle, and the plaintiff (the surety) cannot complain, as the transaction is without his knowledge, that the defendant (the supplemental surety) bound himself only to the extent he thought proper."

In a subsequent part of the same case, Lord Eldon reiterates the remark that, whether the doctrine rests "upon contract or a principle of equity, it is clear that a party may take care by his engagement that he shall be bound only to a certain extent. That is proved by the case of Swain v. Wall, 1 Rep. in Ch. 80, when, the engagement being to pay in thirds, that contract was held to take them out of the principle that would have required a moiety, and also by the case of Deering v. Earl of Winchelsea, 2 Bos. & Pull. 270, where it was admitted, that Lord Winchelsea, though liable as a surety, had by contract withdrawn himself from a liability beyond £4,000."—his bond having been for that sum only, while the other bond was for £10,000. Lord Eldon proceeds: "If therefore by his contract a party may exempt himself from the liability, or from that extent of liability in which, without a special engagement, he would be involved, it seems to follow that he may, by special engagement, contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety, or only if the other does not pay; that is, as surety for the surety, not as co-surety with him." Pursuing these principles, and after having carefully considered the case in 2 Free-

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man, 97, which was cited by the counsel, and has also been relied upon here, and having found that case unsupported by the register, his Lordship rejected the claim to contribution, which was set up by the plaintiff in the case of Craythorne v. Swinburne, 14 Ves. 160. That case is singularly strong in its application to the case at bar.

It is not necessary to go into a philological examination of the memorandum on the second bond. I am satisfied that the object of it was to absolve the supplemental sureties, unless the high sheriff could not be able to get indemnity from the sureties in the first bond. They had a right to bind themselves, or to refuse to be bound altogether. They had, therefore, a right to say how far they would be bound; and their obligation cannot be carried farther. It is obvious they designed only to guaranty the sufficiency of the former sureties, and they were thus (to use the language of Lord Eldon) "not co-sureties with them, but in truth sureties for them." The question, then, which it is most important to answer, refers itself to the execution of this memorandum. I shall only say that I am satisfied it was contemporary with the execution of the bond. The nature of the transaction proves it; and so does the improbability that Lane would have signed it afterwards, when the obligors were in his power, if he declined to do so when they were not. The fact that the bond with its indorsement was among the records of the court (for the copies are certified by the clerk) sustains the conclusion, and fortifies the presumption that this memorandum was made when the bond was executed. So we must take it, as the contrary has not been established by proper and adequate testimony. Upon the whole, I am satisfied there can be no pretense for charging the sureties in the second bond with any part of Wigginton's defalcations.

Then, as to the high sheriff: It cannot be denied that Harrison executed the first bond without any fraudulent inducements held out to him by Lane; and I think it cannot be denied that when the sheriff and Wigginton, his deputy, qualified, the bond was a valid bond as to Harrison. It had been executed by him absolutely, and without expectation or assurance that other sureties would join. His name was last, and he signed opposite to the only remaining seal; and it was more than a month after that the second bond was executed. The bond, then, was once a good and valid bond. How, then, has Lane forfeited his rights under it? Did he forfeit them by taking additional security for his own protection? I apprehend not. The very doctrines we have been considering show that the creditor may take supplemental security, and security, too, that is only to be responsible in the last resort. The case of Craythorne v. Swinburne was just that case. But no authority can be necessary to establish a principle so plain. It seemed to be supposed that he ought not to have taken the supplemental security with the qualification contained in the memorandum. But non constat that he could have got the supplemental security without it; and was he to forego the additional security altogether, merely

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because he could not prevail on the parties to be co-sureties with, instead of being mere guarantors for, the prior sureties? I think not. It was then said that he fraudulently suppressed his knowledge of the insolvency of the four first sureties, and his want of confidence in Wigginton. There can be no fraudulent suppression, where there is no obligation to give information. Now I take it that, when a man joins with others in a bond, it is his business to look to the conduct of the principal and the solvency of the co-sureties. It is not the business of the creditor; and, though it may be benevolent and kind in him to put his surety on his guard, I am yet to learn that it is a duty which the law imposes.

Upon the whole, I am well satisfied that the case has been rightly decided, and that the decree should be affirmed.

Decree affirmed.

GROSS v. DAVIS.

(Supreme Court of Tennessee, 1889. 87 Tenn. 226, 11 S. W. 92, 10 Am. St. Rep. 635.)

Appeal from the Chancery Court of Franklin County; W. S. Bearden, Chancellor.

CALDWELL, J. This is a bill for contribution among sureties.

In April, 1860, John G. Enochs was qualified as clerk of the county court of Franklin county, with Gross, Henderson, Colyar, Slatter, and others as sureties on his official bond.

After the close of the war several suits were instituted against him and his sureties. One of those suits finally resulted in a decree, in this court, against the defendants for about $800, besides costs. The others were successfully defended.

Gross paid the greater part of the decree mentioned, including $130 court costs. The other part of that decree was paid by Davis, as personal representative of Slatter, who had died.

Enochs, the principal, and all the sureties, except those above named, were insolvent when the present proceedings were commenced, and for that reason were not made parties.

In his answer Davis set up the fact of the payment made by him on the decree, and insisted that the estate of his intestate was thereby discharged from further liability.

Henderson claimed in his answer that he had paid for himself and co-sureties more than $1,000 in fees to lawyers, for defending the several suits brought against them and Enochs.

Colyar made no defense, and decree pro confesso was taken against him.

The chancellor adjudged that Gross was entitled to recover from Davis, Henderson, and Colyar, each, one-fourth of the sum he had paid, with interest, making the recovery against each of the three

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$210.06. He then adjudged that Davis was entitled to a credit on the recovery against him by the amount of one-fourth of the sum which Davis had paid, with interest. That credit being $48.04, the net balance of the recovery against Davis was $162.02. Nothing was allowed Henderson on account of attorney's fees claimed to have been paid by him.

Both Davis and Henderson have appealed.

The decree is erroneous. It proceeds upon the idea that every surety who has paid a part of the joint liability may recover from each of his co-sureties his proportionate part of the sum so paid.

As applied to a case where the whole liability has been discharged by one of several sureties, the rule adopted by the chancellor is correct; but it is not applicable when more than one of the sureties have made payments on the joint indebtedness. In the latter case all payments must be added together, and the aggregate divided equally among the sureties.

To illustrate: If the $840.24 paid by Gross had discharged the whole liability, and none of the other sureties had paid anything, he would be entitled to a decree against each of the other three solvent sureties for one-fourth of that amount, namely, $210.06. But as the chancellor adjudged that Gross paid $840.24 and Davis $192.16, and that the other sureties had paid nothing, he should, in that case, have added those two sums together, and divided the aggregate of $1,032.40 into four equal parts of $258.10 each, and allowed contribution accordingly.

The decree thus indicated, upon the data used by the chancellor, would have given Davis credit for the full amount paid by him, and settled the equities of all the sureties, instead of allowing him credit for only $48.04, and leaving him with a claim for the same amount against both Henderson and Colyar, as does the decree actually pronounced.

It is well settled that one surety may have contribution from his co-sureties only when, and to the extent that, he may have paid more than his ratable proportion of the joint liability. Brandt on Sur. and Guar. § 251.

The very foundation of the doctrine is the fact that one has paid more and another less than his share. Hence Davis could not maintain a suit for contribution at all under the facts of this case. He could not recover from Henderson and Colyar the one-fourth of the amount he has paid. Yet the decree leaves him with his claim therefor against each of them.

The decree of the chancellor is erroneous not only in the result reached upon the assumption that only Gross and Davis had made payments on the joint liabilities, but it is also erroneous in that assumption itself; for it is distinctly proven that Henderson paid $1,087.60, for which all the sureties were legally bound to contribute. This sum includes principal and interest up to the time he gave his deposition, which, though in fact a little earlier, we treat as of the date of

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the decree below. This particular date for the addition of interest is adopted for convenience, because the sums already stated as having been paid by Gross and Davis, respectively, include interest up to the same date.

Then we find the fact to be that Gross paid $840.24, Davis $192.16, and Henderson $1,087.60, making a total of $2,120, one-fourth of which is $530. The $530 represents the share of each of the four solvent sureties. This being a suit in equity, the rate of contribution is determined according to the number of solvent sureties, and not by the number of sureties on the bond, as in an action at law. Riley v. Rhea, 5 Lea, 116; Brandt on Sur. and Guar. § 252. In chancery the insolvent principal and insolvent sureties are not even necessary parties. Brandt on Sur. and Guar. § 256.

Henderson has paid more than his part; hence no recovery can be had against him, and, notwithstanding his excessive payment, he can have no recovery in his favor in this proceeding for the excess, because he set up his payment as a matter of defense only, and did not seek any affirmative relief against any one. Gross, however, having filed his bill for that purpose, is entitled to contribution from Davis, who has paid less than his share, and from Colyar, who has paid nothing. The amount paid by Gross in excess of his share is $310.24. That, with interest from date of decree below, he is entitled to recover from Davis and Colyar—one-half from each. We say one-half from each, because the bill treats these two defendants as equally liable to the complainant, and seeks the same decree against each of them. Such expression in pleading, on the part of the complainant, will be regarded, when there is no contravening equity.

The fact that Davis has already paid something and that Colyar has paid nothing affords no reason why Gross should not have an equal recovery against each of them, for one-half the excess paid by Gross and the full sum paid by Davis together do not aggregate as much as $530, the share of one surety in the whole liability discharge.

It has been argued in behalf of Gross that the doctrine of contribution does not extend to attorney's fees, and that, for that reason, the payment of $1,087.60 by Henderson was properly disregarded by the chancellor.

In this view we cannot concur. Suits were commenced against Enochs and his sureties. The services of counsel were needed by the sureties, who made a common defense. Counsel were employed in the name of all the sureties, and rendered services for their mutual benefit. Gross knew this. He accepted the services, took an interest in the progress of the litigation, and distinctly agreed with his co-sureties, from time to time, that he would pay his share of the fees. These were the fees paid by Henderson.

The employment of counsel was not only prudent, but it was necessary, and probably resulted in saving the sureties large sums of money. A surety who pays fees under such circumstances is entitled to con-

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tribution, the same as another surety who pays a judgment or decree recovered against them. By the authorities it is sufficient that the fees were incurred in making a prudent defense. Fletcher v. Jackson, 56 Am. Dec. 102, 23 Vt. 581; Brandt on Sur. and Guar. § 247; 4 A. & E. Enc. of Law, 3, note 1.

As against Gross it is insisted that the chancellor erred in allowing him contribution for the $130 of court costs which he paid. The decree in this respect was right. It has been well said by the Supreme Court of Maine that "the costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one applies equally to the other." Davis v. Emerson, 17 Me. 64; Brandt on Sur. and Guar. § 247.

Contribution was decreed as to traveling expenses in Preston v. Campbell, 3 Hayw. 20.

Let the decree below be reversed, and decree be entered here in accordance with this opinion. One-fourth of all costs in this cause will be paid by each of the four parties.[11]

MACKRETH v. WALMESLEY.

(High Court of Justice, Chancery Division, 1884. 51 L. T. R. N. S. 19.)

This was an action by the plaintiff, Mackreth, as surety to a bond, against his co-surety, Walmesley, asking for a declaration that as between them the co-surety ought to be treated as the principal debtor for the whole amount secured by the bond, or, at all events, to the extent of £125., which sum had been paid by the debtor, Brooks, out of the money advanced to him, to the defendant, Walmesley, in respect of an antecedent debt due from Brooks to Walmesley.

The plaintiff's allegation was that he thought the money was being advanced to the debtor for the purposes of his business, and that if he had known that part of it was to go to the defendant he would not have become a surety to the bond, and he contended that the nondisclosure of the fact vitiated the contract as between himself and his co-surety.

The facts are fully stated in the judgment.†

KAY, J. From the evidence in this case it appears that in the year 1869 the plaintiff, who is a solicitor, was asked by William Brooks, an accountant, to become surety for him. Brooks was engaged in the winding-up of some company or companies, in which business the plaintiff had acted as solicitor. The suretyship was for a loan of £500., which Brooks was about to borrow from a life assurance company. Brooks told the plaintiff that the defendant, Walmesley, who he said

[11] Accord, on the apportionment of the loss among the solvent sureties: Vliet v. Wyckoff, 42 N. J. Eq. 642, 9 Atl. 679 (1887).

† The arguments of counsel are omitted.

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was a rich man, was to be a surety, but that the company required another, whereupon Mackreth agreed, as he says, to oblige him, and, on the 13th August, 1875, a bond was executed by the three. By such bond Brooks and the plaintiff and the defendant bound themselves jointly and severally to three of the directors of the company in the penal sum of £1,000.; the bond being conditioned for the payment of the obligees of six sums of £97. 10s. each, on the 5th April and the 5th October in every year, the first of such payments to be made on the 5th April then next ensuing, and for payment of premiums on a policy on the life of Brooks, and for assigning such policy to the obligees upon trust for the better securing payment of the said sums, or such of them as might remain unpaid, and all costs and expenses to be incurred in enforcing payment thereof. Brooks paid three installments, and the premiums on the policy, and in 1877 he applied to the company for a further loan, and told the plaintiff that the company were going to lend him what would make up with the balance of the old debt another £500., and, on the 13th October, 1877, the plaintiff joined as surety in a new bond which was to the same effect as the first. Brooks paid two installments of £97. 10s. each on this bond. On the 9th July, 1879, he absconded, and was made bankrupt, and no dividend has been paid. The defendant Walmesley paid two installments on the bond of 1877. In July, 1883, the company brought an action against the plaintiff and defendant, and recovered judgment by default, under which the plaintiff has paid them about £61., and a balance of £30. odd now remains due, the rest having been paid by Walmesley. Mackreth has brought this action against Walmesley alone, claiming that Walmesley, as between them, should be treated as principal debtor under the bond of 1877, either altogether, or at least to the extent of £125., and claiming the benefit of all securities given to Walmesley by Brooks.

The ground of this claim is as follows: It seems that in 1874 an agreement in writing was made between Walmesley and Brooks, by which, in consideration of £375. advanced by Walmesley, Brooks agreed to take a man named Smith as his clerk for three years at a salary of £100. a year, and to repay the £375. with interest at 10 per cent. on the 10th March, 1877. By an agreement dated the 13th August, 1875, the same date as the first bond, and made between Brooks and Walmesley, reciting the agreement for suretyship of the first £500., and the obligation of Brooks to pay the £375. on the 10th March, 1877, Brooks agreed to pay to Walmesley, immediately on the receipt of the £500., £125., on which Walmesley was to pay interest at 5 per cent. until the whole was repaid, as follows: So soon as the £375. was paid, Walmesley was to pay the assurance company £27. 10s., part of the last installment but one, and £97. 10s., the whole of the last installment of the £500., but, so long as any part of the £375. and interest remained due, Walmesley was to retain sufficient of the £125. to indemnify him for that amount. Walmesley,

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as I understand, has applied the £125. in part payment of his debt of £375., according to the agreement.

There is no suggestion that these agreements were known to the assurance company. There was no communication whatever between Walmesley and Mackreth in relation to their suretyship. There was not any misrepresentation in the matter. But it is contended that the concealment, or non-disclosure, by Walmesley of the agreement of the 13th August, 1875, entitled Mackreth to throw upon him the whole burden of the first suretyship, and that the bond given in October, 1877, was, to some extent, a renewal of the old liability, and is subject to a like equity. It is said that the point is new, and certainly no case exactly like this has been cited. But the principle involved is very simple. The right of one surety against another is ordinarily for equal or proportioned contribution. It was a right acknowledged at law, and might be enforced by assumpsit, as upon an implied promise by each to pay his aliquot share of the debt. Cowell v. Edwards, 2 B. & P. 268; Batard v. Hawes, 2 E. & B. 287. In equity the relief was larger, being extended to a proportional division of the debt among the solvent sureties, in case of any being bankrupt. But if, as is well settled, a formal contract with the creditor might be avoided in certain cases of concealment by him of material facts from the surety, there can be no reason why the implied contract, or the equity for contribution, between the sureties, should not, in like manner, be resisted. If there be a duty of disclosure between parties bound by an express contract in such cases, why should there not be a like duty where the contract is implied?

However, it is very clear that the obligation of disclosure by the creditor to the surety is a limited one. There may be many things in the knowledge of the creditor which it may be material to the surety to know, but the non-disclosure of which would yet be no defense. In Hamilton v. Watson, 12 Clark & Fin. 109, which was a case of suretyship to bankers for a cash account, Lord Campbell said it would prevent such transactions with bankers "if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know." His Lordship points out that this would include how the account had been kept, whether the debtor had been in the habit of overdrawing, whether he was punctual in his dealings, and the like, and says that, though all these things are material for the surety to know, still, if he does not put questions, it is quite unnecessary for the creditor to volunteer such information, and he adds that the criterion whether the disclosure should be made voluntarily is "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction—that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect." The surety is certainly

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not under any larger obligation to his co-surety than the creditor is under to both of them. It would be extremely inexpedient to invent new equities to enable parties to mercantile contracts to escape from them, or to enlarge in any way the rules of law or equity on this subject.

In order to enable a man to resist fulfillment of such an engagement as arises out of a contract like the present, a state of circumstances should be proved in which it would be fraudulent to insist upon the ordinary consequences of the contract. This was the principle of the decision in all the cases that have been relied on. In Pidcock v. Bishop, 3 B. & C. 605, a guarantee of £200. "value to be delivered" in iron was avoided by a secret agreement between the vendor and purchaser for payment of 10s. a ton beyond the market price, which was to be applied in payment of an old debt. This bargain, it was held, increased the responsibility of the guarantor, and therefore the concealment of it was a fraud upon him. The guaranteed contract was not performed. The value of the £200. was not delivered in iron. In Stone v. Compton, 5 Bing. N. C. 142, there was a direct misrepresentation of fact. In Smith v. Governor and Company of the Bank of Scotland, I Dow. 272, the House of Lords had to deal with the case of a cautioner to the bank for one of their agents, and they considered, as expressed in the remarks of Lord Eldon, that if the bank had held out the agent as a trustworthy person, by concealing facts which gave them ground to believe that he was not so, this might be a defense. The case was referred to in Railton v. Mathews, 10 Cl. & Fin. 934, as an authority for the proposition there established that it is not necessary to prove that the concealment was willful and intentional with a view to the advantage which the person so concealing was to receive.

There may be a case of improper concealment, or non-communication, which may be a defense by a surety where there was not any motive of that kind. In Lee v. Jones, 12 L. T. Rep. N. S. 122, 17 C. B. (N. S.) 482, the concealment by the creditor of a large debt due from the principal debtor beside the amount secured was held to be evidence for the jury in support of a plea of fraudulent concealment of a material fact. Attention is called in that case to the decision in North British Insurance Company v. Lloyd, 10 Ex. 523, that the rule which prevails in assurances upon marine and life risks, that the non-disclosure of material facts, although innocent, vitiates the contract, does not apply to contracts of guaranty. The nature of the agreement in this case which was not disclosed may be shortly stated to be an engagement to make a provision to the amount of £125. for a bona fide debt due, but not yet payable, from the principal debtor to the co-surety. But if that debt were otherwise paid, then the £125. was to be applied to pay off so much of the principal debt. The latter application would be for the benefit of both sureties. I cannot see how the non-disclosure of this part of the arrangement can affect the rights

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of the parties. It is the former part of the agreement on which the plaintiff must rely. Was he so much injured by the concealment of this as to entitle him to relief? He now says that if he had known it he would not have become surety. But I confess I am not satisfied of this. Can the fact of the debt owing by the principal to his co-surety be material? If so, in every case where a debtor owes money to one surety, the other surety may get rid of his liability if this fact is not disclosed. This, in my opinion, is not maintainable. Then it must be, not the fact of the debt, but of the provision made for it, on which the plaintiff must rely. In short, his case is, where a debtor, owing to one surety a sum of money, says to him, "If you will become surety I will pay your debt, or part of it, out of the money I borrow," and this is not disclosed to the co-surety, the latter may avoid his contract.

But a fact, the non-disclosure of which enables a surety to obtain this relief, must be a fact which affects his position, so as to make it worse than he supposed. How does the payment of a debt to his co-surety out of the money borrowed injure him? Clearly in this case the object of borrowing would prima facie be to provide for the debtor's liabilities. Paying the debt to the co-surety would better enable him to meet his liability as surety, and might be an advantage rather than any disadvantage to the other surety. On this point the case of Hamilton v. Watson, to which I have already referred, is of some authority. The suretyship was for an account of the principal debtor with a banker. He was at the time indebted to the bank for a sum which did not come into this account, and the credit guaranteed was applied by the bank to the payment of the old debt. It was held that the non-disclosure by the bank of the existence of the old debt, or of the application of the new credit to pay it, did not enable the surety to escape from his liability. Reliance is, however, placed on the language of the learned judges in that case to the effect that, if there had been a stipulation that the money was to be so applied, it might have affected the transaction; but the case is certainly not a decision that, even if there had been such a stipulation, the concealment of it would have avoided the contract. There is nothing in the language of the judges from which it can be inferred that they would have held in a case like this that one surety was bound to volunteer the disclosure to the other of this agreement with the debtor.

I have considered the case thus far as though the liability under the first bond had been in question. It certainly does not strengthen the plaintiff's claim that he is raising this opposition to his liability to contribute as surety, not on the first, but on the second, bond. He became surety the second time, as he had done before, without any inquiry, and with a readiness which convinces me that if he had known all the facts he now knows he would probably have made no objection. Only a portion of the former debt then remained, and this he knew was to be paid out of the fresh advance, and it would be, in my opinion, somewhat extravagant to hold, even if he might have escaped liabil-

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ity on the first bond as between himself and his co-surety, that this equity could be on that account extended to his liability under the new contract.

Upon the whole I am of opinion that this action fails, and must be dismissed, with costs.[12]

MICHAEL v. ALLBRIGHT.

(Supreme Court of Indiana, 1890. 126 Ind. 172, 25 N. E. 902.)

From the Steuben Circuit Court.

COFFEY, J. This was an action by the appellant against the appellee for contribution. The complaint alleges, among other things, that on the 1st day of November, 1884, Enos Michael, Phillip J. Michael, Jacob K. Fox, Jacob E. Michael, and the appellant and the appellee, executed to John A. Thorp their promissory note for the sum of $1,700; that Enos Michael was the principal in said note, and the other makers were sureties thereon; that after said note became due the appellant paid the same, which then amounted to the sum of $1,900; that at the time appellant paid said note the principal, and all the other parties thereto, except the appellant and the appellee, then were, and ever since have been, wholly insolvent, and had not then, nor have they since had, any property subject to execution; that the appellee is indebted to the appellant, by way of contribution, in the sum of $1,000.

Upon issue joined the cause was tried by a jury, resulting in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

At the proper time the appellant entered his objection to the trial of the cause by a jury, and prayed that the same might be tried by the court; but the court overruled his objection, and he excepted.

The only questions presented for our consideration relate to the action of the court in submitting the cause to a jury, and in overruling the appellant's motion for a new trial.

The first contention of the appellant is that the cause was one of exclusive equitable jurisdiction, and that by reason of the provisions of section 409, Rev. St. 1881, it was triable by the court, and not by jury.

Section 409, supra, provides that "issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court."

In the case of Judah v. Mieure, 5 Blackf. 171, it was held by this court that an action for contribution might be maintained in a court of law; and in the case of Sanders v. Weelburg, 107 Ind. 266, 7 N. E. 573, it was held that such an action was properly triable by jury.

[12] Accord: Weed v. Calkins, 24 Hun (N. Y.) 582 (1881).

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It is conceded by the appellant that, if the present suit was an ordinary action for contribution, it would not be exclusively within the jurisdiction of a court of equity; but he contends that the allegations in the complaint to the effect that some of the sureties are insolvent gives it the character of a cause of exclusive equitable cognizance.

It cannot be successfully disputed that the courts of law have always assumed jurisdiction in actions for contribution, though it has sometimes been held that a plaintiff in an action at law could not recover more than an aliquot part of the whole sum paid in discharge of the debt. But the question as to the extent of the relief granted is not the test as to whether a cause belongs exclusively to a court of equity; but the question is, will a court of law take jurisdiction? If a court of law will take jurisdiction and grant some relief, then the cause does not belong exclusively to the courts of equity.

The better opinion, however, seems to be that courts of law will not only take jurisdiction of the kind of actions now before it, but that they will grant full relief, and where one or more of the sureties are insolvent they will divide and apportion the amount paid among those who are solvent. Henderson v. McDuffee, 5 N. H. 38, 20 Am. Dec. 557; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177.

Our opinion is that the cause before us was not one of exclusive equitable jurisdiction prior to the 18th day of June, 1852, and that the court did not err in awarding to the appellee a jury trial.

The remaining question in the case relates to the sufficiency of the evidence to sustain the verdict.

The evidence in the cause is quite voluminous, but we have given it a careful examination. While it is not as satisfactory as could be desired, we are not able to say that there is no evidence in the record warranting the conclusion reached by the jury. We cannot disturb the verdict on the evidence.

Judgment affirmed.[13]

LIDDELL v. WISWELL.

(Supreme Court of Vermont, 1887. 59 Vt. 365, 8 Atl. 680.)

Assumpsit. Appeal from the municipal court of Rutland. Plea of discharge in bankruptcy. Heard by the court on pleadings and an agreed statement, September term, 1886; Veazey, J., presiding. Judgment pro forma for the plaintiff to recover the sum of $164.31 damages and $7.93 costs, it being one-third of the sum paid by the said

[13] Accord: Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177 (1846). Contra: Batard v. Hawes, 2 El. & Bl. 287 (1853). Compare Stothoff v. Dunham's Ex'r, 19 N. J. Law, 181 (1842); Henderson v. McDuffee, 5 N. H. 38, 20 Am. Dec. 557 (1829); Moore v. Bruner, 31 Ill. App. 400 (1889); Easterly v. Barber, 66 N. Y. 433 (1876); Fischer v. Gaither, 32 Or. 161, 51 Pac. 736 (1898); Wayland v. Tucker, 4 Grat. (Va.) 267, 50 Am. Dec. 76 (1848), obiter.

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Liddell to satisfy the judgment rendered against him on the note signed by the plaintiff, defendant, and seven other parties. In 1872 the plaintiff and defendant, residing at Hydeville, Vt., in common with other citizens, were interested in fitting up a lodge or club room for the use of a society to which they all belonged. To raise money therefor they executed a note, of which the following is a copy:

"Hydeville, April 1, 1872.

"One day after date we jointly and severally promise to pay D. L. Dawley or bearer three hundred dollars, for value received, with interest annually."

There were several indorsements on the note. The note was delivered to said Dawley, the person named therein as payee, who was also one of the signers and makers of the note, and equally interested with the plaintiff and defendant in the purposes for which the money specified in the note was being raised. On receipt of the note said Dawley furnished the society the sum of $300, which was applied to the purposes contemplated. Dawley continued to hold the note for a year or two, when he sold and delivered the same to one Foster for a valuable consideration. Foster sued the note and recovered judgment against the plaintiff, and in 1884 sold the judgment to one Davis, who recovered a second judgment against the plaintiff, which was paid by the plaintiff under compulsion of an execution, amounting, August 5, 1885, to the sum of $491.21. Of the nine signers of the note three died insolvent prior to August 5, 1885. One, J. W. Lee, resides in this state, but is insolvent; one, E. H. Fifield, long ago removed from this state; one has recently died, but his estate is solvent; said Dawley removed to Colorado, and died there prior to said August 5th, but was solvent when he sold the note and at the time of his death. On April 2, 1878, the defendant, in the United States District Court for Vermont, received a discharge in bankruptcy from all debts and liabilities provable under the United States bankrupt act.[14]

Ross, J. There were nine signers to the note of April 1, 1872, Between themselves each signer was principal for the payment of one-ninth of the note, was surety to each other signer for the payment of one other ninth, and co-surety for the payment of the other seven-ninths. These relations the plaintiff had to each of the other signers. He has been compelled to pay the whole note, with an accumulation of interest and costs. He seeks contribution from the defendant. The defendant has interposed his discharge in bankruptcy, obtained before the plaintiff was compelled to make payment. As to the ninth of the note for the payment of which the plaintiff was principal, he has no right of contribution from any one, regardless of the defendant's discharge in bankruptcy. To the ninth of the note for the payment of which the defendant was principal and the plaintiff his surety, we think the discharge in bankruptcy is a bar. It was held to be so under

[14] The arguments of counsel are omitted.

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the bankrupt law of 1841. The plaintiff's right to indemnity arises from the contract of suretyship. The law of 1841 allowed contingent demands to be proved, and the liability of a surety for his principal was held to be such a demand—a demand arising from the contract itself. A distinction was taken between a contingent demand and a contingency whether a demand will ever exist. The liability of a surety for his principal was held to be the former, and the equitable liability between co-sureties to sustain the burden of suretyship equally to be the latter. Hence, while the former was held to be barred by a discharge under the law of 1841, the latter was held not to be barred when the payment was subsequent to the discharge. Swain v. Barber, 29 Vt. 292.

By the bankrupt law of 1867 (Act March 2, 1867, c. 176, § 19, 14 Stat. 525) all provable claims and demands are barred by a discharge. It provides for proving "contingent debts and liabilities contracted by the bankrupt" in two ways: First, by proving the whole claim and receiving a dividend thereon, if the contingency happen before the order for final dividend; secondly, by having the value of such debt or liability ascertained under an order of the court, proving and receiving a dividend on the amount so ascertained. The liability of the principal to indemnify his surety is a contract liability, a direct liability of the surety to the creditor in actual existence, provable under the bankrupt law of 1841, though the surety had paid nothing thereon. Mace v. Wells, 7 How. 272; 12 L. Ed. 698. The bankrupt law of 1867, also, as we have seen, permits such liabilities to be proved. Hence for the ninth of the note for the payment of which the plaintiff was the surety of the defendant the defendant's discharge in bankruptcy is a bar.

The plaintiff and defendant were co-sureties for the payment of the other seven-ninths of the note. When the defendant obtained his discharge, no contingent liability for contribution existed in favor of the plaintiff, only a contingency that such a liability might thereafter arise, if the plaintiff should ultimately be obliged to bear more than his proportionate share of the common burden that might be cast upon him in the payment of that part of the note for which they were co-sureties. The implied obligation of the defendant to bear his proportionate share of the common burden resting on all the co-sureties is not regarded as arising from contract, but from an equitable duty which the sureties are supposed to be cognizant of, and assent to, at the time they enter into the contract of suretyship. 1 Lead. Cas. Eq., notes to Deering v. Earl of Winchelsea, 84, and cases there cited.

In Mason v. Lord, 20 Pick. (Mass.) 447, Shaw, C. J., says: "The action of assumpsit for contribution is founded purely on equitable principles. It proceeds upon the broad ground that when two or more are subject to a loss or burden common to all, and one bears the whole or a disproportionate part, it lays an equitable claim for contribution from those who are thereby proportionably relieved." The doctrine thus announced has been adopted by this court in Mills v. Hyde, 19

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Vt. 59, 46 Am. Dec. 177, and Strong v. Mitchell, 19 Vt. 644. Not being a contingent liability contracted by the defendant existing at the time of his discharge, it was not provable against his estate in bankruptcy, and is not barred by his discharge.

On the facts shown by the agreed case, the plaintiff is under no more duty to go into a foreign jurisdiction, and attempt to secure some indemnity from the estate of D. L. Dawley, than is the defendant. It may be doubtful if anything can be secured from that estate, and, if there can be, it will doubtless be attended with trouble and expense. From the equitable principles which control this class of liabilities, the plaintiff and defendant are in duty bound to share equally the common burden. Hence the defendant cannot be heard to claim that it is the duty of the plaintiff to go to the distant state of Colorado and endeavor to secure something from the estate of Dawley to relieve the defendant from a part of the common burden now resting wholly on the plaintiff. It is held in this state, and generally, that insolvency of one or more of the co-sureties is regarded in actions at law for contribution, and that the share to be recovered by one who has paid the whole debt is determined by the number of solvent sureties; and it has been held by other courts that removal from the state is for this purpose equivalent to insolvency. 1 Lead. Cas. Eq., supra; Boardman v. Paige, 11 N. H. 431.

The pro forma judgment of the county court is reversed, and judgment rendered for the plaintiff to recover one-third of seven-ninths of the debt and costs paid by him August 6, 1885, with interest thereon since August 6, 1885, and his costs.[15]

CHAFFEE v. JONES et al.

(Supreme Court of Massachusetts, 1837. 19 Pick. 260.)

Assumpsit for money paid.[16] * * *

The case was subsequently tried, and the note above described was given in evidence, with proof that the plaintiff had paid it, the principal being insolvent.

The defendant objected to the plaintiff's right to recover, without an averment and proof of notice to the defendant of the payment of the note, and a demand of contribution, before the action was commenced. This objection was overruled; and a verdict was rendered for the plaintiff for one-third of the amount paid, with interest.[17]

[15] On contribution in case of joint contracts and death of one co-obligor surety, see (holding the executor liable) Bradley v. Burwell, 3 Denio (N. Y.) 61 (1846); Waters v. Riley, 2 Har. & G. (Md.) 313, 18 Am. Dec. 302 (1828).

[16] Much of the statement of facts has been omitted, together with the opinion delivered on the questions raised at the first trial.

[17] The arguments of counsel are omitted.

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SHAW, C. J. The court are all of opinion that this objection is not well founded. It depends upon an old and very well-settled rule, that when there is a present duty to pay money, not dependent upon any collateral act to be done, or condition precedent to be performed, the common averment sæpius requisitus is sufficient; but when some collateral act is to be done before the duty arises, and which is necessary to create such duty, the fact must be averred and proved. Com. Dig "Pleader," C, 70. This principle will, we think, reconcile most of the cases. In the present case the plaintiff and the defendant were cosureties, equally liable to pay the note. The plaintiff paid the whole, as he was bound to do, because the principal and the other sureties left it unpaid. The law immediately raised an obligation from the defendant to the plaintiff to pay an aliquot part of this sum, according to the number of the sureties. It was a present debt. It was a payment for the use of the defendant, upon his request implied by law. No special demand and notice therefore were necessary; the sæpius requisitus was sufficient.

Judgment on the verdict.[18]

[18] **Accord: Cage v. Foster, 5 Yerg. (Tenn.) 264, 26 Am. Dec. 265 (1833).**
On right of contribution lost by one surety giving time to a second surety, and thereby discharging a third surety, see note, 14 H. L. R. 547.

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PART III

DEFENSES OF THE SURETY AGAINST THE CREDITOR OR PROMISEE

CHAPTER I

DEFENSES BASED ON THE JOINT NATURE OF THE CONTRACT—THE DEATH OF THE SURETY

COLLINS v. GRIFFITH.

(High Court of Chancery, 1725. 2 P. Wms. 313.)

A., B. and C. were bound jointly and severally in a bond to J. S. C. dies. J. S. brings a bill against the executors of C. for a discovery of his personal estate, and for an account thereof, and to be paid out of assets.

The defendant demurred, and shewed for cause, that it appeared that the bond was a joint bond (which was a mistake, it being joint and several), also for that the other obligors ought to be parties to the suit, and to the account that was to be directed of what was due upon the bond; for perhaps the other obligors might have paid the whole, or at least part of the bond, and there ought to be but one account taken, otherwise there might be a multiplicity of suits, and the defendant liable to a double account.

LORD CHANCELLOR. This appears to have been a bond, as well several as joint; and as the obligee may sue it severally at law, so may he also in equity; if it were not so, there would be no difference in equity betwixt a joint bond, and one joint and several; and if any of the obligors have paid all or part, the obligor who is sued, or his representative, must bring a bill and have it allowed, and it must also lie upon him (sed vide Madox v. Jackson, 3 Atk. 406) to compel the other obligors to contribute towards payment of the debt; the creditor lent his money upon terms to have a security upon which he might sue the obligors severally if he thought fit, and indeed if it were otherwise, that which was intended to strengthen the security would tend to hurt it extremely, for I might not be able to find them all out, and by the same reason that all the obligors are to be sued, if any are dead, their heirs as well as executors are to be made parties, and then, as it would

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be difficult to commence the suit, so the suit when commenced would be subject to continual abatements, which would be a great difficulty on an honest creditor who has fairly lent his money.

Whereupon the demurrer was overruled with great clearness.

RAWSTONE v. PARR.

(High Court of Chancery, 1827. 3 Russ. 424, 539.)

By the decree in this cause it was referred to the master to take an account of the debts of the testator, James Parr.

Messrs. Oldam & Co. claimed before the master to prove a debt due to them from the testator The master reported that, Messrs. John and James Ewing, being indebted to Messrs. Oldam & Co. in the sum of £487. 14s. for goods sold to them, the latter had demanded payment; when the Ewings, being unable to pay, requested Messrs. Oldam & Co. to give them time; and, to induce them to do so, offered to secure the payment of the said sum of £487. 14s. by the promissory note of themselves and the testator James Parr. Messrs. Oldam & Co. acceded to their proposal; whereupon John and James Ewing and James Parr, as their surety, made, signed, and delivered to Messrs. Oldam & Co. a promissory note of the following tenor:

"Liverpool, June 1, 1820.

"Eighteen months after date we promise to pay to Messrs. Oldam & Co. £487. 14s., with lawful interest from the 14th of April last till paid; for value received. J. and J. Ewing.

"James Parr, Surety."

The master further found that the testator, James Parr, died on the 6th of July, 1820; that, on the 6th of February, 1821, a commission of bankrupt issued against John Ewing; that his estate had since been conveyed and assigned to assignees, duly chosen under the commission; that James Ewing had left this country insolvent, having compounded with some of his creditors for 5s. in the pound, and that he now resided in the island of Newfoundland; that the whole of the sum, secured by the promissory note, remained due to Messrs. Oldam & Co.; and that they had offered to prove the said debt under the commission against John Ewing, for the benefit of the estate of the testator, James Parr, after being fully paid 20s. in the pound.

Under these circumstances the master was of opinion that Messrs. Oldam & Co. were not entitled to claim their debt against the estate of the testator, they not having, as he conceived, a remedy at law against his assets; and the master, therefore, disallowed their claim.

Messrs. Oldam & Co. were permitted to except to the report; and the exception now came on to be argued.[2]

[2] The arguments of counsel are omitted.

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THE MASTER OF THE ROLLS. It is apparent, from the nature of this transaction, that the promissory note was drawn in the form of a joint security merely from the ignorance of the parties, and that the real intention was that the testator, James Parr, as surety, should severally pay the debt, on the default of the Ewings. The case is the same, in principle, as if the security were a joint bond, where the intention was that the bond should be joint and several; and there is no reason why a court of equity should not relieve from such a mistake, as well against the surety as against the principal.

Exception allowed.

THE LORD CHANCELLOR. The claim made against the estate of Parr is in respect of his being one of the makers of the promissory note; and his estate can be liable only on the assumption that there was a mistake in the form of the note, and that, in signing as surety, he meant to be severally liable if the Ewings did not pay. Now there is nothing to satisfy me that, if the attention of the parties had been drawn to the circumstance, the creditor would not have been satisfied with the security derived from Parr's becoming jointly liable with the Ewings.

But if any argument in favor of presuming a mistake were to arise out of the circumstance that Parr is joined as surety, how is the supposed mistake to be rectified? It is said it may be rectified by making the note joint and several. The effect of making it joint and several would be that it would not have been necessary for the creditor to sue the Ewings in the first instance, and that he might have proceeded against Parr alone, without even joining the Ewings in the action. But if Parr signed merely as surety, and if effect is to be given to the contract of suretyship, he would not be liable except on the default of the principal debtors. If, therefore, the instrument is to be altered on the ground of its not having carried the intention of the parties into effect, I cannot satisfy myself that their intention would be carried into effect by making it joint and several.

I see no ground for saying that anything more was intended than that Parr should be jointly liable; and I cannot alter the instrument on conjecture.

The judgment of the Master of the Rolls must be reversed; and the exception overruled.[3]

[3] Accord: Primrose v. Bromley, 1 Atkyns, 107 (1739): Other v. Iveson, 3 Drewry, 177 (1855).

Where the obligation is joint and several, the surety's estate is liable for breaches occurring after his death. White's Executors v. Commonwealth, 39 Pa. 167 (1861); Primrose v. Bromley, 1 Atkyns, 107 (1739).

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HARRISON, Ex'r of Minge, v. M. FIELD, Ex'r of J. Field.

(Court of Appeals of Virginia, 1795. 2 Wash. [Va.] 136.)

This was an appeal from the High Court of Chancery. The case was: The testator of the appellee having loaned to William Claiborne a sum of money, he, together with Minge as his surety, executed a joint bond to the testator for payment thereof. The bill states that the testator of the appellee did not discover until after the death of Minge (who was survived by Claiborne) that the bond was joint, instead of joint and several, that Claiborne was at that time and is now insolvent, that the loan was made entirely on the credit of Minge, and that the bond was executed at a time when Field was not present. The object of the bill was to recover the debt from the executor of Minge.

The appellant demurred to the relief sought, and assigned as cause thereof that by the appellee's own showing the bond was joint, and that Minge died in the lifetime of the other obligor. He also answered, asserting that Claiborne was in good circumstances when the loan was made; and he avers that he neither knows nor believes that the loan was made on the credit of Minge, or that the bond was made a joint one by mistake or fraud.

The demurrer, coming on by consent to be argued, was overruled, and commissions for taking depositions were awarded. But the cause being brought on during the same term for a hearing upon the bill, answer, and bond, a decree was pronounced that the appellant out of the estate of Minge in his hands to be administered should pay to the appellee the principal money due by the bond (reduced according to the scale of depreciation), with interest and costs.

From this decree Harrison appealed.[4]

ROANE, J. In this case there is no evidence that the bond was made a joint bond by fraud or mistake, or, if any such did exist, that Minge was privy to the same. The chance of survivorship was equal, and Minge was willing to submit to the legal consequences of such a bond. There may possibly exist reasons with an obligor for preferring a joint to a joint and several bond, and it is impossible for this court to decide whether such reasons did or did not prevail with Minge. The law is laid down in the case of Towers v. Moor, 2 Vern. 99, that in a joint bond the duty survives against the surviving obligor. The case of Simpson v. Vaughan goes expressly upon the lending being to both of the obligors. A moral obligation therefore was imposed upon both by the contract to pay the debt, and if by the form in which the bond was drawn the remedy was gone at law, the court thought it equitable to relate back to the moral obligation which was equally strong on both of the obligors. But in this case the surety was under no moral obligation, not having been a borrower of the money, and was only bound by the bond itself. No antecedent contract therefore subsisted

[4] The arguments of counsel are omitted.

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between him and Field whereon to found an equity for the extraordinary interposition of the court of chancery. The case of Bishop v. Church also goes upon the lending being to both of the obligors. I will not say that there may not be circumstances which would subject even a surety to the relief now sought for, but I am clear that the present case is totally destitute of them, and therefore I am of opinion that the decree is erroneous.

FLEMING, J. In the cases of Simpson v. Vaughan and of Bishop v. Church, the obligors were partners in the business; both had the benefit of the money lent, and the survivor became bankrupt. A stronger case could not have occurred to warrant the equitable relief granted by the court. In the latter case, the Chancellor postponed a decision of the cause, that inquiry might be made into the neglect suggested against the obligee, and it is highly probable that, if it had been proved, he would have dismissed the bill. In this case Field, if he could upon any ground have been entitled to the relief he now asks for, would come into a court of equity with a very bad grace, after lying by so long as he has done, until Claiborne, the principal, has been reduced in his circumstances, and as the answer suggests is now unable to pay. Upon the whole, I am of opinion, that Minge was a mere surety, not bound at all in conscience, and his executor, being exonerated at law, ought not to be charged in equity.

THE PRESIDENT. The case of Acton v. Pierce, 2 Vern. 480, in principle has no application to the present. A husband upon his marriage agreed to leave his wife £1,000. if she survived him; a bond for this purpose was drawn by an unskillful hand, and was made payable to the wife, with condition to leave her the £1,000. In that case, the husband was by his agreement, and for a consideration deemed valuable in law, a debtor to the wife, and under a moral obligation to pay. Though the remedy was gone at law by the intermarriage, and that, in consequence of the unskillfulness of the draftsman, yet the husband's conscience was bound, and therefore the court very properly considered him as a trustee for the wife. The principle contended for by Mr. Stark, that a loan creates a moral obligation to pay, which, being a duty antecedent to and independent of the bond, cannot be discharged by the loss of the bond, or by other accident is true, as to the borrower, and the cases of Simpson v. Vaughan and of Bishop v. Church are decided upon this ground only.

The Chancellor indeed in Simpson v. Vaughan is made to say that no stress was laid upon the circumstance of the obligors being partners. But this is certainly a mistake of the reporter, for in the case of Bishop v. Church the counsel, speaking of Simpson v. Vaughan, says: "The consideration your Lordship went upon was that it was a sum lent to both, of which both had the advantage, and a debt arose against both from the nature of the transaction." In this assertion he is not contradicted by the Chancellor, which would seem to prove that the lending and borrowing was the ground upon which

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the decision in that case was bottomed. The principle, then, of these cases, has no application to the present. The surety received no benefit from the loan; he was bound by no contract, express or implied, antecedent to the bond; he was under no moral obligation to pay, and, of course, equity would not bind him farther than he was bound at law.

It is a maxim that, where equity is equal, he shall prevail who has the law in his favor, and the cases cited in Francis' Maxims of Equity, p. 71, as an illustration of the principle, are very strong indeed to show that a surety has equal equity with the obligee, and, being discharged at law, equity will not charge him.

It is true a court of equity will set up a lost bond against a surety; but the reason is that the surety is not discharged by the loss of the bond, and the court only relieves against the accident by setting up the evidence of the debt.

It was argued that it did not appear that Minge was a surety. This is a fact not to be disputed, since the bill itself so states it. Bonds are sometimes so drawn that it is impossible to distinguish the surety from the real debtor; but, when distinguished by proof, the uncertainty arising from the face of the instrument can make no difference in the principle. Since the act of assembly which gives to sureties a summary remedy against their principals, it might be well to distinguish in the bond the one from the other.

It was contended that the demurrer admitted the truth of the allegations in the bill. It is true that a demurrer without an answer does admit the facts charged on the other side; but if the defendant also answers, and denies the allegations of the bill, as the defendant has done in this case, it cannot be said that they are acknowledged. When the demurrer was overruled, general commissions for taking depositions were awarded, of which the plaintiff might have availed himself if he had wished to establish any facts important to his cause. But, instead of this, he appears to have consented to bring on the cause for a hearing without testimony, and therefore there is no ground for giving him an opportunity now of taking depositions.

The opinion of the court is "that the testator, David Minge, having been neither the borrower nor the user of the money lent to and used by Claiborne, but a surety only, ought not in equity to be further or otherwise bound than he was bound by the contract at law; and, no fraud or mistake appearing to have occurred in the writing of the bond, it is to be considered as a joint obligation and subject to the legal consequence of Minge and his representatives being discharged by the death of him in the lifetime of Claiborne, and that the said decree is erroneous."

Decree reversed, with costs, and the bill dismissed.[5]

[5] Accord: Weaver v. Shryock, 6 Serg. & R. (Pa.) 262 (1820); Kennedy v. Carpenter, 2 Whart. (Pa.) 344 (1837). But see infra, effect of statutory changes.

Contra: Susong v. Vaiden, 10 S. C. 247, 30 Am. Rep. 50 (1878), a judicial reversal of the common-law doctrine of survivorship.

In many states by statute the estate of a deceased joint promisor is made

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WINSLOW v. PARKURST'S HEIRS.

(Supreme Court of Errors of Connecticut, 1791. 1 Root, 268.)

Petition in chancery, showing that said Parkurst and one Gleason were jointly bound to the petitioner for £100., which had never been paid; that since the death of said Parkurst judgment and execution had been obtained against said Gleason, and returned non est, and that he is become bankrupt; that said Parkurst left a plentiful estate, which has descended and come to his heirs, the petitionees; that said Gleason was his executor, but never gave any bond for a faithful administration; and that he is without remedy at law.

THE COURT, upon inquiry, found the facts proved, and ordered and decreed the heirs of said Parkurst should contribute and pay said debt to the petitioner in proportion to the interest they severally received of their father's estate.[6]

liable in the same manner as though the contract was joint and several. See, inter alia:

Pollard's Code of Virginia, 1904, § 2855: "Of Writings Binding Persons Jointly.—The representative of one bound with another, either jointly or as a partner, by judgment, bond, note, or otherwise for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner as such representative might have been charged, if those bound jointly or as partners had been bound severally as well as jointly, otherwise than as partners. Code 1849, p. 582, c. 144, § 13."

Wisconsin: St. 1898, p. 2452, § 3848.

Massachusetts: Rev. Laws 1902, vol. 2, p. 1293, c. 141, § 8.

New Hampshire: Pub. St. 1901, p. 630, c. 191, § 20.

New Jersey: 2 Gen. St. 1895, title "Obligations," p. 2336, § 3, construed in Thompson v. Johnson, 40 N. J. Law, 220 (1878) to apply to simple joint contracts.

See Donnerberg v. Oppenheimer, 15 Wash. 200, 46 Pac. 254 (1896); Hudelson v. Armstrong, 70 Ind. 90 (1880), construing Act Dec. 30, 1817 (Rev. Laws 1824, c. 55); Redman v. Marvil, 73 Ind. 593 (1881); Tremain v. Severin, 16 Ind. App. 447, 45 N. E. 620 (1896); Burns' Ann. St. Ind. 1908, §§ 2830, 654.

New York: Code Civ. Proc. (6th Ed. Parker) § 758. Prior to the amendment by Laws 1877, c. 416, the common-law doctrine of survivorship existed in New York. See Getty v. Binsse, 49 N. Y. 385, 10 Am. Rep. 379 (1872); Davis v. Van Buren, 72 N. Y. 587 (1878); Chard v. Hamilton, 56 Hun (N. Y.) 259, 9 N. Y. Supp. 575 (1890), affirmed in 125 N. Y. 777, 27 N. E. 409 (1891). In New York, before the amendment of the Code in 1877, the distinction was further made that if the surety receives a benefit from the transaction his estate is not discharged, notwithstanding the joint nature of the contract. Richardson v. Draper, 87 N. Y. 337 (1882).

In Pennsylvania, see Act April 11, 1848 (P. L. 536), construed in Bowman's Adm'rs v. Kistler, 33 Pa. 106 (1859); Hughes' Appeal, 13 Pa. Super. Ct. 240 (1900).

See, also, cases collected in Ames' Cases on Suretyship, p. 332, note 1; 7 Am. & Eng. Ency. Law (2d Ed.) p. 101.

The question of survivorship in joint contracts is in the main one of local statutory provisions. See, further, as to particular jurisdictions: Stimson's American Statute Law, p. 453, § 4113, art. 411.

If a joint judgment is obtained against principal and surety, jointly bound.

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[6] Accord: Cox v. Maddux, 72 Ind. 206 (1880); Smith v. Ballantyne, 10 Paige (N. Y.) 101 (1843).

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CHAPTER II

IMPOSSIBILITY OF PERFORMANCE—THE DEATH OF THE SURETY

SAYMOND v. GENT.

(Court of Queen's Bench, 1596. 1 Rolle's Abr. p. 14, pl. 6.)

If A buys goods of B and, because B distrusts the payment of A, J. S. promises that if A does not pay it at such a day he himself will pay it, J. S. dies and the monies are not paid at the day, the executors of J. S. can be charged in an action on the promise although it is collateral.[1]

In re WHELAN.

DODD v. WHELAN.

(High Court of Justice, Chancery Division, Ireland. [1897] 1 Ir. R. 575.)

Adjourned summons.

The Bank of Liverpool, Limited, claimed to be creditors on the estate of the deceased, John Nolan Whelan, in respect of three bills for £2,000. each, which had been discounted by them in April and May, 1895, after Whelan's death, and also for advances made in

the death of the surety after judgment would at the common law discharge his estate. United States v. Price, 50 U. S. 83, 13 L. Ed. 56 (1850); Fielden v. Lahens, 6 Blatchf. 524, Fed. Cas. No. 4,773 (1869). This rule has likewise been altered in many American states by statutory provisions. See Baskin v. Huntington, 130 N. Y. 313, 29 N. E. 310 (1891).

In some jurisdictions by express statutes joint contracts are made joint and several. Rev. Laws Minn. 1905, § 4282; Morgan v. Brach, 104 Minn. 247, 116 N. W. 490 (1908); Civ. Code Ala. § 2503; Code Tenn. 1896, §§ 4484, 4486; Code W. Va. 1906, § 3787; Code Iowa 1897, §§ 3465, 3468, 3542.

Other statutory provisions designed to destroy the incidents of joint contracts are: Rev. Codes Idaho 1908, §§ 4147, 4860, 4865; Code Civ. Proc. Cal. §§ 388, 414, 989, 994; Code Civ. Proc. N. Y. §§ 1932–1947; Comp. Laws S. D. 1908, vol. 2, pp. 341, 405, §§ 113, 466, 471; 2 Gen. St. N. J. 1895, title "Obligations," p. 2336, § 2.

[1] Accord: Y. B. 12 Hen. VIII, fol. 11, pl. 3; In re Silvester, [1895] 1 Ch. 573, bond of sureties to guaranty payment for carriage of coals; Fewlass v. Keeshan, 88 Fed. 573, 32 C. C. A. 8 (1898); In re Busch's Estate, 12 Phila. (Pa.) 53 (1878); United States v. Keiver (C. C.) 56 Fed. 422 (1893), bond for appearance of principal at court; White's Exr's v. Commonwealth, 39 Pa. 167 (1861); De Morat v. Howard, 6 Pa. Dist. Rep. 761 (1896); Holthausen v. Kells, 18 App. Div. 80, 45 N. Y. Supp. 471 (1897), estate of surety for tenant held liable for rent accruing after surety's death; Pond v. United States, 111 Fed. 989, 49 C. C. A. 582 (1901).

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December, 1895, for the firm of Whelan & Maher, in which the deceased had been a partner, and which was admittedly insolvent. No notice of Whelan's death had been given to the bank, but it was admitted that in November, 1895, the bank manager had heard, in a conversation with a stranger, that the guarantor was dead. The claimants relied on a letter of guarantee dated 25th March, 1891, given to them by the deceased, which stated: "This is to be a continuing guarantee, notwithstanding any changes in the partnership of Whelan & Maher."

The chief clerk ruled that the guarantee ceased on the death of Whelan on 12th April, 1895, and the questions submitted for decision of the judge were: (1) Did the guarantee continue to the closing of the account on 1st January, 1896? (2) If not, did the guarantee determine at the death of Whelan or upon notice of his death? [2]

CHATTERTON, Vice Chancellor. This is a claim made by the Bank of Liverpool to be allowed as creditors of the deceased, whose assets are being now administered, on foot of a guarantee given by him for the balances to be from time to time due to the Bank by the firm of Whelan & Maher. There is no question as to the liability of the deceased as guarantor for the portion of the claim of the bank which was due by Whelan & Maher at his death, but the executors of Whelan dispute their liability to any portion of the claim which is for advances to the firm after the death of the testator, or, if this be too extensive, to the portion of the claim which was for advances since the bank had knowledge of his death. They contend that it is not necessary to prove any formal notice given to the bank of the death, or of the intention to terminate the guarantee as to future advances.

I do not think that, having regard to the decision of the Court of Exchequer in Bradbury v. Morgan, 1 H. & C. 249, and the cases which have followed it, I can hold that the mere fact of the death of the guarantor, unknown to the creditor, terminated the operation of the guarantee. But the question arises whether mere knowledge of the death has that operation, without formal notice being given by the executors to determine the guarantee. The nature of such guarantees and the right to determine them was carefully considered by Bowen, J., in the case of Coulthart v. Clementson, 5 Q. B. D. 42, an action which was tried by him on circuit, when he reserved the case for his further consideration. It was argued before him subsequently, and he again took time for consideration, so that the questions there raised were fully deliberated on by that eminent judge, and his opinion is entitled to great weight. He put the case as one of contract, and refers to the decision of the Court of Common Pleas in Offord v. Davies, 12 C. B. (N. S.) 748, and held that it was established by authority that such continuing guarantees can be withdrawn on notice during the lifetime of the guarantor, and that a limitation to that effect must be

[2] The arguments of counsel are omitted.

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read, so to speak, into the contract. He then proceeded to consider the question of what is to happen on the death of the guarantor, and asks if the guarantee is then to become irrevocable and to go on forever? He replies, and I think conclusively, that such a consequence of the death would be absurd. In this conclusion I entirely agree. He then proceeds to consider what notice should be deemed sufficient, and asks, Must the executor give special notice that the guarantee is withdrawn, or is it not enough that the creditor should be warned of the death of the guarantor and the devolution of his estate to others? and holds that, in the absence of special option to the personal representative to continue the guarantee, the notice of the death of the testator and of the existence of a will is constructive notice of the determination of the guarantee as to future advances.

These words cannot be limited to cases where a will exists, and are a fortiori applicable to cases of intestacy, for such an option could only be given by a will, and if no will exists no such option can exist. In the absence of express authority from the deceased, whether he dies intestate or makes a will not giving such option, it would be equally outside the duty of the executor or of the administrator, as the case may be, to continue the course of dealing. Knowledge of the death therefore is, as considered by Bowen, J., sufficient to put the creditor on inquiry whether there is any testamentary authority before making further advances. Nor is there any hardship upon or injustice to the creditor in so holding. His knowledge of the death should be enough to require him to hold his hand, and ascertain whether or not there is any option given to the personal representatives of the guarantor to continue the course of dealing, or rather to enter into a new contract of suretyship. The decision in Coulthart v. Clementson, 5 Q. B. D. 42, is clear that, in case no such option exists, the course of dealing is determined by knowledge of the death.

The opinion of Mellish, L. J., in Harriss v. Fawcett, L. R. 8 Ch. App. 866, a case referred to, not on this part of the question, by Bowen, J., in Coulthart v. Clementson, 5 Q. B. D. 42, is quite in accordance with his views.

The case of Coulthart v. Clementson, 5 Q. B. D. 42, was commented on by Romer, J., in In re Silvester, [1895] 1 Ch. 573; but I cannot regard the dicta of the learned judge as sufficient to displace the decision of Bowen, J., which was not appealed from, and which I am prepared to follow. Of course, in the case of express provisions in the contract of guarantee, effect must be given to them, according to the true construction of the instrument; but there is not, in my opinion, anything in this letter of guarantee bearing upon the present question.

I therefore hold that the advances made by the bank subsequent to their having knowledge of the death of the testator are not covered by the guarantee, but that those made prior to this were so covered.

The evidence of the time at which the bank first knew of the testator's death is not satisfactory, and consists of the admission of

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their principal officer that he knew of it in either November or December, 1895. I shall therefore assume the date of the 1st of December, 1895, as the time.

The claimants to have their costs with their demand.

In re CRACE.

BALFOUR v. CRACE.

(High Court of Justice, Chancery Division. [1902] L. R. 1 Ch. Div. 733.)

Point of law.

In 1882 the plaintiff, Blayney Reynell Balfour, who was the owner of certain estates in Ireland, appointed one Dolling to act as agent to his estates and receiver of the rents thereof, and, in consideration of this appointment, Dolling, and his father-in-law, John Gregory Crace, as his surety, executed a joint and several bond, dated June 25, 1883, for the sum of £3,000. in favor of the plaintiff. This bond was given at the plaintiff's request by way of security for the due performance by Dolling of his duties and obligations as the plaintiff's agent and receiver.

The bond was in the following form:

"Know all men by these presents that we, Caledon Josias Radcliffe Dolling, of 34 Mountjoy Square, in the city of Dublin, Esquire, and John Gregory Crace, of No. 38 Wigmore street, London, in the county of Middlesex, and of Springfield, Dulwich, Esquire, are jointly and severally held and firmly bound to Blayney Reynell Balfour, of Townley Hall, Drogheda, in the city of Louth, Esquire, in the sum of £3,000., to be paid to the said Blayney Reynell Balfour, or his attorney, his executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves and each of us, one and each and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents."

The bond then recited that Dolling had previously been employed by the plaintiff's predecessor in title, B. T. Balfour, as agent of the estates, and proceeded as follows:

"And whereas, the said Blayney Reynell Balfour has appointed the said C. J. R. Dolling his agent or receiver of the rents, issues, and profits of all his estates in Ireland; and whereas, upon such appointment of the said C. J. R. Dolling as aforesaid the said B. R. Balfour required the said C. J. R. Dolling to enter into security for the sum of £3,000.; and whereas, the said J. G. Crace has consented to become surety for the said C. J. R. Dolling: Now, the condition of the above obligation is such that, if the above bounden C. J. R. Dolling shall pay or cause to be paid to the said B. R. Balfour all sums of money which shall represent the rents, issues, and profits of the said estates payable

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to the said B. R. Balfour, as executor of the said B. T. Balfour, and shall and will from time to time, and at all times hereafter as often as requested by the said B. R. Balfour, his executors, administrators, or assigns, well and truly pay or cause to be paid unto the said B. R. Balfour, his executors, administrators, or assigns, all such sum or sums of money as he, the said C. J. R. Dolling, shall have had or received of the said rents and profits of the said estates, and shall and will render to the said B. R. Balfour and his heirs, executors, administrators, and assigns true, just, full, and perfect accounts of all and every such sum and sums of money as shall be by him had or collected from the tenants and occupiers of the said estates, or from or on account of the rents and profits of the said estates, or any part thereof, or for or on account of the said B. R. Balfour, his heirs, executors, administrators, or assigns, and shall and will, while he shall continue to act as such agent or receiver, well, justly, truly, and honestly in every respect conduct himself in the said office of agent or receiver of the said rents, then this obligation and every matter and thing therein contained shall be void and of no effect; otherwise, the same shall remain in full force and virtue in law."

Dolling continued to act as the plaintiff's agent and receiver until about February, 1900; but in April, 1900, he executed an assignment to a trustee for the benefit of his creditors, and left the country, having failed to account to the plaintiff for large sums received on his behalf.

J. G. Crace died on August 13, 1889, having by his will appointed the defendants to be his executors. This was an action by the plaintiff seeking to make the defendants liable upon the bond.

The defendants pleaded that the liability of their testator under the bond ceased upon his death.

By an order dated October 28, 1901, upon the application of the plaintiff, and upon an admission by him that the said J. G. Crace died on August 13, 1889, and that he, the plaintiff, had notice of the death shortly after that date, the following point of law was directed to be tried before any evidence was given or issue of fact tried, namely: "Whether the liability (if any) of the said J. G. Crace under the bond dated the 25th of June, 1883, was determined on the death of the said J. G. Crace, or when such death first became known to the plaintiff." During the course of the argument the form of the question was slightly amended, and as amended read as follows: "Whether the liability (if any) of the said J. G. Crace under the bond was determined immediately or otherwise by the mere fact of his death coming to the knowledge of the plaintiff."[3]

JOYCE, J. I think it is undoubted law that a continuing guarantee not under seal for future advances, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be

[3] The arguments of counsel are omitted.

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terminated at any time unless the contrary be expressly stipulated. Now, the reasons for this in the case of such a guarantee are, I think, pretty obvious on a moment's consideration, and they are put very lucidly in the judgment of Erle, C. J., in Offord v. Davies, 12 C. B. (N. S.) 748.

When such a guarantee is under seal, I think it has been held at law that the guarantor is not entitled by notice to determine its operation. But in equity I think, even in the case of a continuing guarantee under seal, such a guarantee as that I have mentioned, where, as Lush, L. J., puts it in the case of Lloyd's v. Harper, 16 Ch. D. 319, "the consideration is fragmentary, supplied from time to time, and therefore divisible," the operation of the guarantee as to future transactions may be determined by notice. Now, the right to determine or withdraw a guarantee by notice forthwith cannot possibly exist, in my opinion, when the consideration for it is indivisible, so to speak, and moves from the person to whom the guarantee is given once for all, as in the case of the consideration being the giving or conferring an office or employment upon any person whose integrity is guaranteed. It is impossible that the guarantor should be entitled by notice, unless he has expressly so stipulated, to determine that guarantee instanter. Time must be allowed—at all events, it is admitted that some time must be allowed—for a lawful determination of the employment by the person to whom the guarantee is given, and I think, with reference to a guarantee of the nature which we have to consider in the present case, many other considerations are applicable besides merely a lawful determination of the employment by giving six months' notice, or something of that kind. As I said in the course of the argument, six months' notice might determine the employment just in the midst of the audit or receipt of the rents; or the employer might be placed in such a position with reference to the person employed that it might be most inadvisable and injurious to him to put an immediate end to the employment.

If, however, such a guarantee can be determined by notice at all, the question what length of notice the employer must necessarily be entitled to, I think, has not been determined, and must depend upon the circumstances of the particular case. Now, that being so, there is no difficulty whatever to my mind in answering the question which was argued before me as it originally stood. It would have been impossible to hold that with respect to this guarantee, where there is no stipulation to the contrary, the liability of the guarantor under the bond was determined immediately, either on the death of the guarantor or on the fact of his death coming to the knowledge of the person to whom the guarantee was given. But I am told that that is not the real question, and it was proposed to alter the question in a form which was partly suggested by myself, and the question I have to decide is whether the liability, if any, of Mr. Crace under the bond, was determined, immediately or otherwise, by the mere fact of his death coming to the

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knowledge of the plaintiff. Now, whatever the true answer to that question may be, and whether such a guarantee as this can be determined by notice or not, I certainly agree with what Romer, J., says in In re Silvester, [1895] 1 Ch. 573, 577, where he observed, on Lord Bowen's decision in Coulthart v. Clementson, 5 Q. B. D. 42: "I desire to add that I do not assent to the general proposition that, where a person who is himself entitled to the benefits of a contract of guaranty has notice of the death of the guarantor and that he left a will, he is, without more, affected with notice of the contents of the will, or is bound to assume that prima facie it would be a breach of trust on the part of the executor not to give notice to determine the liability."

I desire to express my entire agreement with that, whatever the proper answer be to the question whether such guarantee as that which we have to consider in this case can be determined by notice or not. Really what we have to decide is this: Whether, when the guarantee is of this kind, given as part of the consideration for the appointment to an office or employment of a person by another to whom the guarantee is given, the law requires the guarantor, in case he desires the guarantee to be determinable by notice or by his death, to have it expressly so stipulated; or does the law require the person to whom the guarantee is given to have it expressly so stipulated if the guarantee is not to be determined by notice or by the death of the guarantor? Well, after listening to the argument and giving some consideration to the case, I have come to the conclusion that upon the whole, where an office or employment is conferred in consideration of such a guarantee as that in this case, it is safer to hold that the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice, or to be determined by his own death. And in coming to that conclusion I rely on Gordon v. Calvert, 2 Sim. 253, 4 Russ. 581, 29 R. R. 94, and also upon what I understand to be the reasoning of the Lords Justices in Lloyd's v. Harper, 16 Ch. D. 290, although I have not forgotten that there was a special fact in that case, namely, that the person whose integrity was there guaranteed was in what was analogous to employment which could not be determined by Lloyd's.

Therefore I can answer this question, as altered, by saying that the liability, if any, of the said John Gregory Crace under the bond dated June 25, 1883, was not determined, immediately or otherwise, by the mere fact of his death coming to the knowledge of the plaintiff.

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KNOTTS v. BUTLER, Adm'r, et al.

(Court of Appeals of South Carolina, 1858. 10 Rich. Eq. 143.)

Before Wardlaw, Ch., at Orangeburg, February, 1857.

WARDLAW, Ch. In 1847, and for some time afterwards, Sanders Glover, Sanders L. Glover, and William R. Davis, conducted the business of factors, in the city of Charleston, as partners, under the style of Glovers & Davis. For the credit and accommodation of the firm, some of their friends in the country signed the following guaranty:

"To the President and Directors of the Bank of the State of South Carolina:

"The subscribers hereby guarantee, jointly and severally, the payment of all drafts or notes made, or to be made, by Messrs. Glovers & Davis, factors, of Charleston, and of all drafts accepted by them, which may be discounted by you; and we declare this to be a continuing guaranty, and that it is to remain of force till revoked by written notice to the president or cashier of said bank; and we waive notice of the acceptance of this guaranty. This guaranty to take effect from the date hereof, and our liability thereunder not to exceed five thousand dollars.

Charles Glover,
"William Knotts,
"V. D. V. Jamison,
"James Grimes."

The guaranty is undated, except by a pencil mark, September, 1847; and it is conceded that it was delivered to the bank about that time.

In August and September, 1852, Glovers & Davis made five notes for the aggregate sum of $19,300, payable at the said Bank of the State, which were discounted by said bank, and, not being paid at maturity, were protested for non-payment.

On February 9, 1854, the bank brought an action of assumpsit against the plaintiff, Knotts, in the court of common pleas for Orangeburg, for recovery of so much of said unpaid notes as was protected by the guaranty; and at spring term, 1856, of said court, recovered judgment against him for $5,000, with interest from October 1, 1852, and costs. On January 12, 1857, plaintiff Knotts satisfied this judgment in full, viz., $5,752.40.

Charles Glover, one of the guarantors, died intestate, February 11, 1848, and administration of his estate was committed to the defendant, Joel Butler, April 6, 1848, who published the proper notice for twelve months to creditors to present their demands. He avers that he had no notice of this guaranty until the commencement of the suit against Knotts. The bank presented no claim against intestate's estate, and gave no notice to the administrator.

Glovers & Davis are insolvent; and so, also, are two of the guarantors, V. D. V. Jamison and James Grimes. The estate of

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Charles Glover is ample, and much of it remains undistributed in the hands of the administrator.

Plaintiff filed this bill January 12, 1857, against the administrator of Charles Glover, and against Jamison and Grimes, to compel contribution for his payment in extinguishment of their common guaranty.

Defense is made only in behalf of Charles Glover's estate. By the express terms of the guaranty, it was continuing as to existing and future drafts and notes of Glovers & Davis, discounted by the bank, until revoked in a special mode by written notice to the president or cashier. The liability of the guarantors was limited only as to the amount. The statute of limitations, which is pleaded, but not urged, is inapplicable between the bank and the guarantors, and there is no pretense of improper delay on the part of the plaintiff in seeking a remedy. It is supposed, but without reason, that he is in some fault for not giving notice to the administrator of the liability of intestate's estate; but he and intestate were equal joint contractors, bound by the same law and equities, and without any special duty on his part to intestate. Until he discharged the guaranty, his laches could not begin.

It is urged, however, that the death of intestate, more than four years before the debt to the bank protected by the guaranty was created, and the notice of administrator to creditors, are together equivalent to the special revocation of the guaranty stipulated in the instrument, as equity looks to substance and not form; consequently that the liability of intestate to the bank and to the plaintiff had ceased. The notice to creditors required by our act of 1789 is intended for the protection of an administrator who proceeds to make regular distribution of the estate, in ignorance of some dormant debts of his intestate; but until he has made distribution, and so long as he retains assets for the satisfaction of all debts, it is quite immaterial to creditors and to himself whether or not he may be informed of particular claims, not brought specially to his attention within a year. An administrator becomes a debtor by relation and not by his own contract, and does not necessarily know, nor is bound to know, all demands created by his intestate; and this affords an adequate reason why he should not suffer in his private estate from laches of creditors in bringing forward their claims, but where the reason is inapplicable the unnecessary protection ceases.

Here there was no debt, no breach of the guaranty, at the death of the intestate. Intestate contracted for an indefinite space of time to indemnify the bank in discounting certain drafts and notes; and no principle requires that his contract should terminate with his life. The guaranty is not the mere delegation of an agency to the bank to deal, instead of Charles Glover, as principal, with Glovers & Davis, in certain matters, which would cease at the principal's death; but it is a contract to indemnify against certain acts of third persons, and to assume a future contingent liability, if these acts be done. What obstructs one from indemnifying against the consequences of an event

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which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years from his death? It is asked, How long shall such guaranty continue in force? And the answer is, until it be ended according to its terms. The administrator, on whom the liability devolved, might have given the written notice to the president or cashier, prescribed by the instrument. I am of opinion that the plaintiff is entitled to contribution from the defendants, and that the case is governed by the doctrines of McKenna v. George, 2 Rich. Eq. 15.

As to the costs of the law case, as there is no evidence that Knotts defended except for his own accommodation, or of any agreement on the subject, or of any benefit from the defense to the guarantors, plaintiff is not entitled to contribution on that score.

It is adjudged and decreed that the plaintiff, William Knotts, recover from the defendant, Joel Butler, administrator, one moiety of the sum paid by the plaintiff in extinguishment of the guaranty, with interest from January 12, 1857. It is further adjudged that a lien be created on the estates of V. D. V. Jamison and James Grimes, respectively, for their equal shares in liability under said guaranty; and it is ordered that if, when the defendant, Butler, as administrator, shall have paid said moiety, the said defendant and the said plaintiff may have execution against said Jamison and Grimes, to compel contribution, care being taken that actual contributions be kept equal, and that no party be exempt from one-fourth part of the sum covered by the guaranty.

It is further ordered that the parties have leave to apply, at the foot of this decree, for further orders in execution of the decree.[4] * * *

Appeal dismissed.[5]

ROYAL INS. CO. v. DAVIES.

(Supreme Court of Iowa, 1875. 40 Iowa, 469, 20 Am. Rep. 581.)

Appeal from Scott Circuit Court.

The plaintiff's petition states that on or about January 26, 1872, W. F. Kidder, as principal, and John L. Davies, as surety, executed and delivered to the plaintiff their bond as follows:

"Know all men by these presents, that I, William F. Kidder, of the town of Davenport, county of Scott, state of Iowa, as principal, and John L. Davies, of the town of Davenport, county of Scott, state of Iowa, as surety, are held and firmly bound unto the Royal Insurance

[4] The opinion deals only with the right of contribution, and the opinion of Dunkin, Chancellor, is omitted.

[5] Bramwell, B., in Bradbury v. Morgan, 1 Hurl. & C. 249 (1862), said: "If the guarantee had been in these terms, 'I request you to deliver to A. to-morrow morning goods of the value of £50., and in consideration of your so doing I will pay you,' and before the morning the guarantor died, but the goods were

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Company of Liverpool, a corporation authorized by act of Parliament, and located at Liverpool, England, in the sum of one thousand dollars, to be paid unto the said company, their certain attorneys or assigns, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

"Sealed with our seals and subscribed at Davenport, Iowa, this 26th day of January, 1872.

"The condition of this obligation is such that whereas, the above-named W. F. Kidder, has been appointed by the aforesaid company their agent for the city of Davenport, county of Scott, and state of Iowa, during the pleasure of the manager and attorney thereof, by reason whereof and as such agent he will receive into his hands and possession divers sums of money, policies, chattels and other effects, the property of said company, and is bound to keep true and accurate accounts of said property and of receipts and disbursements, and to deliver, account for, and pay over the same when demanded and directed according to the instructions of the directors of said company.

"Now, therefore, if the said W. F. Kidder shall promptly pay to the said company the amounts received from time to time, and shall well and truly perform all and singular the duties as agent of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing, or which may be adopted by said company, for and during the time he officiates as said agent, and shall deliver all the property which he may receive and hold as said agent, to his successor in office, or to such other person as the said company or its authorized officers may direct, then this obligation shall be null and void; otherwise, remain in full force and virtue.

"[Signed] W. F. Kidder. [Seal.]
"John L. Davies. [Seal.]

"Signed, sealed and delivered in the presence of
"H. Goodrich."

It is further alleged that Kidder was duly appointed agent of plaintiff January 26, 1872, and continued to act until his death, December 19, 1872; that at the time of his death he was indebted to the plaintiff in the sum of $219.58, for premiums collected by him in October, 1872; and that plaintiff has expended $11.50 in an effort to collect said sum from the estate of said Kidder.

The defendant answered, admitting substantially the allegations of the petition, and alleging as an affirmative defense thereto that John L. Davies, the surety, died on the 23d day of April, 1872; that thereby

duly delivered, I can see no reason why the personal representative of the guarantor should not be liable; and whether a guarantor says, 'Deliver some goods on a given day,' or 'Deliver a quantity of goods upon any day, or days,' can make no difference." The learned Baron also states that the law is incorrectly stated in Williams on Executors (5th Ed.) 1859.

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his estate was discharged from any further liability on said bond; and that up to the time of his decease the conditions of said bond had not been broken; but that the breaches thereof alleged in the petition happened after the death of said Davies.

To this answer the plaintiff demurred, which being overruled and plaintiff standing thereon, judgment was rendered for defendant. Plaintiff appeals.

MILLER, C. J. The question presented in the record is whether the death of Davies, the surety in the bond, operated in law as a discharge of his estate from liability for the default of the principal, happening after the death of the surety; in other words, whether the death of the surety operated to terminate the obligation assumed by him when he executed the bond on his part. It is not claimed on the part of the defendant that the liability of the surety, or his obligation as such, was terminated by reason of any act or omission of the plaintiff; but it is claimed that the obligation of the surety ceased, and the bond became defunct, as to every act done after the death of the surety, by reason of such death alone. By the terms of the bond the surety, Davies, bound himself, his "heirs, executors and administrators," as surety for his principal, Kidder. This language shows no intention to limit the liability to the lifetime of the surety; on the contrary, it imports that the liability shall continue after his death, and bind his heirs and personal representatives. This intention is further manifested by the subsequent language of the bond, in defining more particularly the obligation assumed by the obligors therein. It is that, "if the said W. F. Kidder shall promptly pay to the said company the amounts received from time to time, and shall well and truly perform all and singular the duties as agent of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing or which may be adopted by said company, for and during the time he officiates as said agent, * * * then this obligation shall be null and void; otherwise, remain in full force and virtue."

This language clearly shows that the obligation of the sureties to the bond was to continue for and during the time Kidder, the principal, should officiate as agent of the company. Of course, the death of Kidder would terminate the obligation of the sureties, for thereby the agency of Kidder would terminate. The terms of the bond continue the liability of the sureties as long as Kidder should act as agent of the company, and this liability, likewise by the terms of the bond, extends to the heirs and legal representatives of the sureties. They are bound by as clear and unmistakable language as that which binds the sureties personally. Instead of there being any intent manifested to limit the obligation of the sureties to the terms of their respective lives, it is clearly shown that it was intended the obligations should extend to and bind the heirs and personal representatives of the sureties, and that the binding force of the bond and the sureties'

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liabilities should continue as long as Kidder should act as the agent of the company.

No case exactly in point has been cited by appellant, and no authority whatever is cited by appellee. We are clear, however, that upon the general principles regulating contracts, and the terms of the bond in this case, the death of the surety, Davies, did not terminate the binding force of the bond upon his heirs and legal representatives for the failure of Kidder, while he was the agent of the plaintiff, to pay over money coming into his hands as such agent. The case of Gordon v. Calvert, 4 Russ. 581, cited by appellant, supports the view we have here taken.

The court erred in overruling the plaintiff's demurrer to the answer. Reversed.[6]

CALVERT et al. v. GORDON, Ex'x.

(Court of King's Bench, 1828. Dan. & L. Merc. Cas. 173, 3 Man. & Ry. 124.)

Debt on bond conditioned for the fidelity of R. Edwards, as collecting clerk to the plaintiffs, whilst he should continue in their service. The issue of fact raised by the pleadings was whether Edwards had received and duly accounted for certain sums, and the point of law involved was whether the defendant, being the executrix of the surety, could immediately release herself from further liability by giving notice to the plaintiffs that she would no longer be responsible. The case came on for trial at Guildhall, before Lord Tenterden, at the sittings after Trinity term, when a verdict was taken by consent for the plaintiffs; and F. Pollock now moved the court, either for a new trial, on the ground that the jury ought, upon the point of law, to have been directed to find nominal damages only on one of the breaches, or,

[6] Accord: Lloyd's v. Harper, L. R. 16 Ch. Div. 290 (1880); Estate of Rapp v. Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427 (1885).

Similarly the estate of the surety of an executor or administrator is bound for defaults occurring after the surety's death. See cases under title "Executors and Administrators," 11 A. & E. Ency. of Law (2d Ed.) p. 897. And, by a statute making heirs liable to a decedent's creditors, the heirs of a guardian. Voris v. State, 47 Ind. 345 (1874).

Similarly the estate of the surety of a bank cashier. Shackamaxon Bank v. Yard, 143 Pa. 129, 22 Atl. 908, 24 Am. St. Rep. 521 (1891). Of a city treasurer. Mowbray v. State, 88 Ind. 324 (1882). Of a guardian. Moore v. Wallis, 18 Ala. 458 (1850). Of an administrator. Hightower v. Moore, 46 Ala. 387 (1871); Cotton v. State, 64 Ind. 573 (1878). Of a deputy sheriff. Green v. Young, 8 Greenl. (Me.) 14, 22 Am. Dec. 218 (1831); Carr v. Ladd, Smith (N. H.) 45 (1803). In the last-cited case the court remarked: "The proper remedy against the mischiefs that have been suggested by the counsel for the defendant would be for the sureties to stipulate only for a certain time, or to introduce a stipulation that, on notice by the surety that he would no longer be holden, the responsibility should terminate. If no such covenants are inserted, and the covenantors oblige themselves as long as the deputy remains in office, it must depend on the pleasure of the sheriff how long they shall be bound. Arguments for inconvenience have no place where the law is clear."

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if the court were not inclined to grant this, then his application was that the judgment should be arrested. The court, with some reluctance, allowed him to proceed; and he contended that the defendant was not answerable in damages to the plaintiffs, the liability being determined on the delivery of the notice; but

PER CURIAM. We are not called upon now to say what effect a notice to the obligee from the surety that from some future day he would no longer hold himself liable would have in determining that liability. The question raised by these pleadings is whether the obligation would cease from the very day in which the notice is given. There has been no reason assigned why it should. A party deliberately entering into suretyship cannot release himself at any moment. It would be hard upon the master if he could. The master cannot, upon the instant, dismiss his clerk, and provide himself with another. It is said that it will be a hardship on the surety if his liability is to continue perhaps during the whole life of the person for whose fidelity he engages. It may be so; but we can only look to the instrument, and, judging from that, we must collect that it was his intention so to bind himself. If it be found inconvenient to incur an obligation so extensive (as it may), it may in future be matter of consideration whether it cannot by some means be limited. All difficulties would be obviated if a provision were embodied in the instrument that the obligor should be discharged from his liability in a specified time after due notice given.

Rule refused.[7]

There had been a demurrer to the pleadings in this cause, which was argued in Hilary term last, and is reported in 7 Barn. & C. 809. In giving judgment on that occasion, Bayley, J., expressed a strong doubt (though the point was not judicially before the court) whether a surety could discharge himself by such a notice. The hint of the Chief Justice as to future surety bonds is well worth attention.

[7] In the principal case an application was afterwards made to chancery without success. See Gordon v. Calvert, 2 Simons, 253 (1828), 4 Russ. 581.

In Pleasonton's Appeal, 75 Pa. 344 (1874), the surety of a lessee on a lease for one year, which provided that on the lessee's holding over the lease would be extended another year, died, and six months before his death he notified the landlord that he would not be responsible any longer than the current year. Held that his estate was not liable for rent beyond the current year.

The proper interpretation of a provision for special notice to terminate a suretyship upon the guarantor's death was decided in In re Silvester, [1895] 1 Ch. 573, to require not only notice of the death but of an intention to determine the liability.

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GAY et al. v. WARD, Adm'x.

(Supreme Court of Errors of Connecticut, 1895. 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818.)

Action for contribution, brought to the Superior Court in Hartford County, and reserved by that court, Thayer, J., upon an agreed statement of facts, for the advice of this court. Judgment advised for the defendants.

The case is sufficiently stated in the opinion.

GEORGE W. WHEELER, J.[8] This case comes before us for our advice, on a reservation upon an agreed statement of facts, and with a stipulation, entered into by all the parties to the record, that all questions arising upon the pleadings or upon the agreed facts may be finally determined by this court.

On January 8, 1872, the stockholders of the Delaney & Munson Manufacturing Company, located at Farmington, Connecticut, executed and delivered to the National Exchange Bank of Hartford a contract of continuing guaranty in the form of a bond, the terms of which appear at length in the opinion of this court in the case of National Exchange Bank v. Gay, 57 Conn. 224, 231, 17 Atl. 555, 4 L. R. A. 343, brought against one of the guarantors upon the bond.

This bond guaranteed to the bank "the full, prompt and ultimate payment" of all commercial paper which the bank may "have discounted or may hereafter discount * * * to an amount not to exceed $15,000 in all at any one time." It provided that, upon notice to the bank by one or all of the guarantors upon such instrument, such guarantor or guarantors should not be holden upon said bond for any liability created by such company subsequent to the giving of such notice. From the date of the bond to February 9, 1888, the bank discounted commercial paper of said company, upon which date the company failed. On January 21, 1889, the bank recovered judgment against the executors of Gay, one of the guarantors upon the bond, for the sum of over $11,000, which sum, together with the expenses of the suit, the executors paid. Subsequently Wadsworth, another guarantor upon the bond, voluntarily paid to the executors of Gay one-half of said amounts.

The present action is brought by the executors of Gay and of Wadsworth against the administratrix of Augustus Ward, a guarantor upon the bond, William Potts, administrator upon the estate of Samuel S. Cowles, a guarantor upon the bond, Horace Cowles, a son of said Samuel S. Cowles, and Mary C. Hardy, a purchaser from a distributee of the estate of Horace Cowles.

Said Ward died April 6, 1883; his estate was duly settled and distribution made December 8, 1883. Said Samuel S. Cowles died in

[8] The arguments of counsel have been omitted.

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1873; his estate was duly settled and distribution made June 7, 1873, a part being distributed to his son, Horace Cowles who died in 1876; his estate was duly settled and distribution made September 25, 1876. A part of the estate inherited by Horace Cowles from his father, Samuel S. Cowles, was purchased by Mary C. Hardy from a distributee of the estate of Horace Cowles, and owned by her when she was made a party to this action.

All of the discounts existing February 9, 1888, which the estate of Gay and Wadsworth paid, were made by the bank long subsequent to the death of Samuel S. Cowles, and none were renewals of discounts made in his lifetime. Five thousand dollars of said $11,000, were discounts made by the bank after having notice of Ward's death, and $6,000 of said $11,000 were renewals of paper made after notice of Ward's death, but of paper originally discounted prior to Ward's death. The bank, Gay, and Wadsworth had immediate notice of the death of said Samuel S. Cowles and of Ward. The said Manufacturing Company was solvent at the time of the death of said Samuel S. Cowles and of Ward.

The stockholders of the Delaney & Munson Manufacturing Company, by pledging their individual credit to the National Exchange Bank, secured funds, through discounts made by the bank, with which to conduct its business. "To avoid the inconvenience of indorsements by several individuals upon each of a large number of original notes and the renewals thereof, the obligors made one comprehensive continuing contract of indorsement in the form of a guaranty under their respective hands and seals." National Exchange Bank v. Gay, supra.

The bond constituted a contract of continuing guaranty upon the part of its obligors or guarantors of payment of all paper discounted by the bank up to the limit of the amount named in the bond. No consideration passed at the execution of the bond. Each discount, when made upon the credit of the guaranty, constituted a consideration, separable and divisible. No obligation arose and no liability was created until a discount was made upon the credit of the guaranty. The bond was framed to meet the contingency of the long continuation of discounts by the bank, and the extension and renewal of discounts made upon the security of its guaranty.

Upon the nature of this guaranty this court expressed itself, in the case we quoted from above, as follows: "To guarantee 'full and prompt' payment would meet the case of a note, on usual bank time, actually to be paid in full at maturity. To guarantee, in addition to 'full and prompt' payment, the 'ultimate' payment, can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals and extensions."

The bank was under no compulsion to discount the company's paper. It might, at its option, refuse to continue discounting it. When it made the discounts, the guaranty of the bond attached. Each guarantor upon the bond might, upon notice in writing to the bank, termi-

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nate all liability thereafter arising under the bond. Unless the terms of the guaranty forbid, the law writes in the contract of continuing guaranty a like power to revoke the guaranty upon notice. Coulthart v. Clementson, L. R. 5 Q. B. Div. 42; Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Agawam Bank v. Strever, 18 N. Y. 502.

The effect of the death of a guarantor upon a continuing guaranty has been determined differently in different jurisdictions. In Massachusetts the death is held to work a revocation of the guaranty. The court in construing a continuing guaranty of the sale of goods, in the case of Jordan v. Dobbins, supra, said: "Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke." See, also, Hyland v. Habich, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383, 15 Am. St. Rep. 174.

In England death does not work a revocation of the continuing guaranty. The case of Coulthart v. Clementson, supra, was an action brought by a bank upon a continuing guaranty against the executor of a deceased guarantor. The court said: "A guaranty like the present is not a mere mandate or authority revoked ipso facto by the death of the guarantor."

These two cases illustrate the two views held by courts of different jurisdictions. We prefer to adopt the latter view. To adopt the Massachusetts doctrine would impose upon the guarantee the burden of knowing at all times whether or not the guarantors are in life. There could be no safety in relying upon the credit of the guarantor unless at the moment of reliance the guarantee knew the guarantor to be in life. The practical difficulties in the way of a guaranty so construed would prevent credit being given upon it and curtail a useful method of commercial business. Further a guaranty of this nature is intended to continue until revoked by act of the parties or its equivalent.

But when the guarantee has knowledge of the death of the guarantor, such knowledge works a revocation of the guaranty. The guaranty no longer relies upon the credit of the deceased guarantor. Each advance made by the guarantee constitutes a fresh consideration, and, when made, an irrevocable promise or guaranty on the part of the living guarantors. Each advance thereafter made is upon the credit of the living, not of the dead, guarantor. Were this not so—unless it be held that the representatives of the deceased may upon notice terminate the guaranty—the guaranty terminable at the option of the guarantor during life becomes, upon his death, never-ending. The limitation which the law gives the living is denied the dead. Estates

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must remain unsettled, devises of property be withheld so long as the guaranty may last, and the representatives of the deceased guarantor be powerless to save his estate from a loss which neither he nor they authorized or received benefit for. Such a result justifies and impels a court in reading into the guaranty a limitation of termination of the guaranty upon notice of the death of the guarantor, as well as upon notice from the living guarantor. Any notice of death which brings that fact within the knowledge of the guarantee is a proper and sufficient notice.

In the case of Coulthart v. Clementson, supra, the court said: "It is now established by authority that such continuing guaranties can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guaranty irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract, in order to protect the dead man's estate, a limitation which is read into it to protect him while he is alive. * * * But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guaranty by notice cannot any longer be a giver of notices; that his estate has passed to others, who have trusts to fulfill, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guaranty, then the bank has constructive notice that the guaranty is withdrawn." Nat. Eagle Bank v. Hunt, Adm'r, 16 R. I. 148, 13 Atl. 115; Harriss v. Fawcett, L. R. 15 Eq. Cas. 311.

The authorities uniformly hold, either that death, ipso facto, or notice of death, revokes a continuing guaranty. The fact that the instrument is under seal cannot change its nature or construction. Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Offord v. Davies, 12 C. B. N. S. 748. A similar doctrine holds that notice of the dissolution of a copartnership revokes a continuing guaranty made by the copartnership. City Nat. Bank of Poughkeepsie v. Phelps, 86 N. Y. 484.

The application of these principles to the case in hand is this: All of the discounts, for which recovery was had against Gay's estate and payment made by Gay's executors and Wadsworth, were made after notice of the death of Samuel S. Cowles. His representatives are therefore freed from all liability for such discounts. Liability, if any, for discounts so made upon the credit of the guaranty, could only accrue against the estate of Samuel S. Cowles, and could in no view of the case be maintained against the estate of Horace Cowles, or Mary Hardy.

Five thousand dollars of the said discounts were made after notice of the death of Augustus Ward. His representatives are therefore

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freed from all liability for such discounts. The remaining discounts, $6,000, were originally made before the death of Augustus Ward. His death, with notice, did not relieve his estate from liability for such discounts. For all discounts made prior to his death, whether original discounts, or renewals, or extensions thereof, his estate is liable upon his death.

The duty of the bank upon this bond, if it desired to hold the estate of Ward liable, was to enforce its claim upon the paper existent at Ward's death, against his estate. Instead of this the bank renewed and extended its discounts, taking new paper for the old, without the knowledge or acquiescence of the representatives of Ward. Thereafter the bank must look to the remaining guarantors upon the bond. It waived its right to enforce payment from the estate of Ward, when it accepted paper in renewal of the old. Each renewal of the old paper constituted payment of the old paper, so far as Ward's estate was concerned. Each renewal so made had, for its security, the guaranty of the living guarantors upon the bond, who had not notified the bank of the termination of their liability upon the guaranty.

The conclusion arrived at is just to the bank, for it can cease, upon notice of the death of a guarantor, to renew paper then discounted, and can enforce its payment against the estate of the deceased guarantor. It is just to the remaining guarantors, who can, upon notice of the death of a guarantor, terminate their liability, and, if compelled to pay that liability, by appropriate remedy compel the estate of the deceased guarantor to contribute his proportion to the liability incurred. For all liability arising before notice of the death of the guarantor, the remaining guarantors can provide by the terms of the guaranty.

In the case at hand all the guarantors upon this bond had notice of the death of both Samuel S. Cowles and Augustus Ward, and made no attempt to terminate their liability upon the bond, and no effort to compel the estate of either to help meet the liability existing; but thereafter, without the knowledge, consent, or acquiescence of the representatives of Cowles or Ward, renewed the old paper through a long series of years, and increased their own liability by fresh discounts.

A renewal of paper made before the death of a guarantor, upon the credit of a bond guaranteeing payment of such paper, made after notice of said death to the guarantee, terminates the liability of such guarantor after said notice.

The precise question at issue was determined, in accordance with the conclusions we reach, in the case of National Eagle Bank v. Hunt, 16 R. I. 148, 153, 13 Atl. 115. In its opinion the court said: "The guaranties in the case at bar come within the second class above considered. They were, therefore, upon the authorities cited, terminated by the death of the guarantor, and notice of it to the plaintiff, as to all subsequent transactions. As, however, the note described in the declaration had been discounted, and the net proceeds had been paid to the

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maker prior to the death of the guarantor, the plaintiff would have been entitled to recover, but for the fact, set up in the pleas, that after notice of the death of the guarantor it extended the time of payment for a further period by taking a new note from the principal debtor and receiving the interest thereon in advance, without the consent of the defendant, and without any reservation of his right, assented to by the principal, to insist upon immediate payment by the principal, and, in default of such payment, to pay the debt himself, and proceed at once against the principal. That such action on the part of the plaintiff was sufficient to release the estate of the guarantor, and the defendant as his representative, from liability, is too well established to need the citation of authority."

The question whether a guaranty will be revoked by notice of death, when by the terms of the guaranty the guarantor could not in life have revoked the guaranty, is not before us, and we express no opinion upon this point.

The claim that, because the bond of guaranty in this case bound the guarantors to the "full, prompt and ultimate payment" of all paper discounted after the execution of such bond, therefore the guaranty covers discounts made before the death, and the renewals of such discounts made after the death of the guarantor, cannot be sustained. The guaranty here applies to paper discounted, and to the renewal or extension of such discounts, before the decease of a guarantor. Otherwise a continuing liability existed against the estate of the deceased guarantor so long as the renewals were made. Such a result was not intended by the parties to the bond. They did not intend to continue a liability after the death of a guarantor, for an indefinite period, which he and they could terminate at any time during his life. A contract of guaranty is to be construed so as to promote the use and convenience of commercial intercourse. Davis v. Wells, 104 U. S. 159, 169, 26 L. Ed. 686. And its language is not to be extended by any strained construction, for the purpose of enlarging the guarantor's liability. Hall v. Rand, 8 Conn. 560, 573. But its construction is to be according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. Lee v. Dick, 10 Pet. 482, 493, 9 L. Ed. 503; Evansville Nat. Bank v. Kaufmann et al., 93 N. Y. 273, 281, 45 Am. Rep. 204. These established rules of construction accord with the construction we give to the guaranty before us.

We deem it unnecessary to discuss other questions argued before us, since the questions considered are decisive of the case.

We have not overlooked the fact that there has been a misjoinder of parties defendant. The estate of Horace Cowles and Mary Hardy were strangers to the guaranty. The representatives of Samuel S. Cowles are alone liable upon his obligations.

There is, as well, a misjoinder of parties plaintiff. Mr. Wadsworth voluntarily paid one-half of the amount recovered against the estate of

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Gay. He cannot now maintain with Gay's representatives an action to compel payment to them of the share of other guarantors paid by him for them.

The superior court is advised to render judgment in favor of the defendants. In this opinion the other judges concurred.[9]

HECHT et al. v. WEAVER.

(Circuit Court of United States, District of Oregon, 1888. 34 Fed. 111.)

DEADY, J. A motion for a new trial in this case was argued and submitted with the one in the foregoing case.

The action was commenced by the plaintiffs, who are citizens of Massachusetts, against the defendant, as administrator of the estate of Hans Weaver, deceased, to recover the sum of $4,475.90 on a bond executed to the plaintiffs by Philip Peters, Hans Weaver, Robert Phipps, as sureties, and W. F. Owens, as principal, on October 24, 1884, in the penal sum of $15,000, conditioned that if Owens shall pay on demand the sums of money advanced to him by the plaintiffs, then the obligation to be void, and otherwise to remain in full force. The bond also contains a stipulation to the effect that its duration might be terminated on notice to the obligee, after all liabilities thereunder were discharged. The bond purported to be signed by the obligors "in the presence of Lafayette Owens and T. C. Stearns"; and the former, when called as a witness by the plaintiffs, testified that he signed the bond as a witness at the request of Owens, but the other parties thereto were not present, nor did he see them sign the same. Stearns was not called.

Weaver and Owens died, as stated in the foregoing case, and due demand was made upon their administrators for the balance due the plaintiffs, with similar results. The answer of the defendant was confined to a denial of any knowledge or information of the matters in controversy. On the trial the jury found a verdict for the plaintiffs for the sum of $3,975.90 on which they had judgment.

The motion for a new trial is based on the same grounds as the one in the Hall Case (C. C.) 34 Fed. 104, with the addition of the following:

It appears that some of the advances to Owens were made after the death of Weaver, and that no notice was given by the administrator to terminate the undertaking of the deceased. The court instructed the jury that Weaver's estate was liable in the hands of his administrator for these advances, and this instruction is claimed to be erroneous, and a new trial asked therefor.

[9] Accord: Coulthart v. Clementson, 5 Q. B. Div. 42, (1879).

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On a careful examination of the authorities I have concluded that whenever the undertaking of the surety is for a definite period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond until notice is given the obligee that the liability is terminated, the estate of the surety in the hands of his administrator is answerable for any default of the principal occurring after his death; and this is especially so where, as in this case, the surety bound himself, his "heirs, executors and administrators" for the performance of his undertaking. Insurance Co. v. Davies, 40 Iowa, 469, 20 Am. Rep. 581; Green v. Young, 8 Greenl. (Me.) 14, 22 Am. Dec. 218; Knotts v. Butler, 10 Rich. Eq. (S. C.) 143; Moore v. Wallis, 18 Ala. 458; Hightower v. Moore, 46 Ala. 387; Mowbray v. State, 88 Ind. 327.

The motion is denied.[10]

[10] On the subject of statutory liens to preserve contingent claims against the estates of sureties in Pennsylvania, see Stevenson, Trustee, v. Long, 23 Pa. Co. Ct. R. 391 (1896), construing Act June 8, 1893, § 1 (P. L. 392).

Act June 8, 1893: "Section 1. Be it enacted, etc., that no debts of a decedent dying after the passage of this act, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than two years after the decease of such debtor, unless an action for the recovery thereof be commenced against his heirs, executors or administrators within the period of two years after his decease, and duly prosecuted to judgment, or a copy or particular written statement of any bond, covenant, debt or demand, where the same is not payable within the said period of two years, shall be filed within the period of two years in the office of the prothonotary of the county where the real estate to be charged is situate, and then to be a lien only for the period of two years after said bond, covenant, debt or demand becomes due. And it shall be the duty of the prothonotary of said county, when a statement as aforesaid is filed in his office, to index the same in the judgment docket as other liens are indexed."

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CHAPTER III

IMPOSSIBILITY OF PERFORMANCE—THE DEATH OF THE PRINCIPAL

NELSON v. ANDERSON.

(Court of Appeals of Virginia, 1800. 2 Call, 286.)

Anderson brought actions of debt in the District Court, against Nelson, as security to Maury, upon two appeal bonds dated December 1, 1786, the conditions of which after reciting the judgments appealed from, proceeded thus: "Now, if the said Walker Maury shall effectually prosecute the said appeal, perform the judgment of the General Court, and pay all costs and damages which shall be awarded by the said General Court, in case the judgment aforesaid shall be affirmed, then the above obligation to be void; otherwise, to remain in full force and virtue." The plaintiff assigned for breaches of the conditions "that Walker Maury, named in the said condition, did not effectually prosecute the appeal mentioned in the said condition according to the form and effect thereof."

The defendant took oyer of the bond and condition, and pleaded: "That the said Walker Maury departed this life before the trial of the appeal, for the effectual prosecution of which this defendant is charged by the plaintiff's declaration to have bound himself, and the failure in the same, on the part of the said Walker Maury, is assigned as the breach of the condition of the writing obligatory in the plaintiff's declaration mentioned, whereby an abatement of the said appeal was adjudged by the court before whom the said appeal was depending on the 5th day of May, 1790, at which time, and at all times since, no revival of the said appeal has been adjudged or effected. Wherefore he says that he ought not to be charged, etc. All which he is ready to verify. Wherefore he prays judgment, etc." General demurrer thereto by the plaintiff; and joinder.

The second bond, the pleadings, demurrer and joinder, are in all respects the same as the first, except that in the plea the words, "and the failure in the same, on the part of the said Walker Maury, is assigned as the breach of the condition of the writing obligatory in the plaintiff's declaration mentioned," are omitted.

The district court gave judgment for the plaintiff; and Nelson appealed to this court.[1]

LYONS, Judge, delivered the resolution of the court: That conditions of this kind, where the act was to be performed personally by one

[1] The arguments of counsel have been omitted.

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of the parties, were for the benefit of the obligors, who stood excused when the act of God, or of the law, prevented the performance. Laughter's Case, 5 Co. 21. That it rested on the same footing as costs, which are not recoverable, where the party dies and the suit abates, unless it be revived. That the party here, who was to perform, being dead, it was impossible that the stipulated act could be done by him, which, therefore, excused the security. But, as the condition of the bond also was that he should pay the debt in case the judgment should be affirmed, if an affirmance had taken place after the death of the principal, the securities would have been liable; and it was in the power of the appellee to have sued a scire facias, and obtained a judgment of affirmance, if there was no error; whereas, it was not in the power of the security to have done this; neither could he have compelled the executor to have sued a scire facias, and revived the appeal. That, consequently, as the appellee might have done it, and the security could not, it was more reasonable that the appellee should suffer for the neglect, than that the security should; especially when it was considered that, if he had actually sued a scire facias, the judgment might, perhaps, have been reversed. So that, although the security was not in danger, if the cause had been brought to a hearing in the appellate court, he might be rendered liable, in consequence of the neglect to obtain the scire facias, which never could be right. That the court was therefore of opinion that the judgment should be reversed, and judgment entered for the appellant, upon the demurrer.

Judgment reversed.

DAVIDSON et al. v. TAYLOR.

(Supreme Court of the United States, 1827. 12 Wheat. 604, 6 L. Ed. 743.)

MARSHALL, C. J., delivered the opinion of the court.

This is a case of bail, and is to be decided by the principles of English law, which the case finds constitute also the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender the principal, after the return of a ca. sa., is considered as a matter of favor and indulgence, and not of right, and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed by the return of the ca. sa. But the courts allowed the bail to surrender the principal, within a limited period after the return of the scire facias against them, as matter of favor, and not as matter pleadable in bar. In certain cases, even a formal surrender has not been required, where the principal was still living, and capable of being surrendered, and an exoneretur would be entered, and the principal discharged, immediately upon the surrender. But the rule has never been applied to cases where the principal dies before the return of the scire facias. In such a case the bail is considered as fixed by the return of the ca. sa. and his death after-

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wards, and before the return of the scire facias does not entitle the bail to an exoneretur. The plea is therefore bad; and the judgment is affirmed, and six per centum damages and costs.[2]

Judgment affirmed.

LEGATE et al. v. MARR.

(Supreme Court of Indiana, 1847. 8 Blackf. 404.)

Error to the Bartholomew Circuit Court.

BLACKFORD, J. This was an action of debt founded on a penal bond, alleged to have been executed to the plaintiffs in error by James Marr, who was the defendant's intestate, together with Henry Dritt, George Piner, and Daniel B. Holtshouse. The condition of the bond was that said Dritt, who had appealed from a judgment of a justice of the peace against him in favor of said plaintiffs, should prosecute the appeal with effect, and pay the condemnation money and costs in case judgment should be rendered against him in the circuit court. Two breaches were assigned: (1) That Dritt did not prosecute his appeal with effect, but wholly failed to do so, etc.; (2) that after the transcript of the judgment mentioned in the appeal bond was filed in the circuit court, and before the suit on appeal was tried, the said Dritt died, and the suit on appeal was thereby abated.

The defendant craved and obtained oyer of the bond on which the present suit was founded. The bond given on oyer commenced as follows: "Know all men by these presents, that we, Henry Dritt, Samuel H. Steenbarger, George Piner, Daniel B. Holtshouse, and James Marr, are held," etc. Plea to the first breach, that after the execution of the bond, and before the first day of the term of the circuit court, the appellant died, and the suit on appeal became thereby abated.

The defendant demurred to the second breach, and the plaintiffs demurred to the plea to the first breach.

The court overruled the demurrer to the plea, sustained the demurrer to the second breach, and gave judgment for the defendant.

In support of the judgment, the defendant contends: (1) * * * (2) That the decease of the appellant, and the consequent abatement of the suit on appeal, did not show a breach of the condition of the bond.[3] * * *

On the other point the defendant must also fail. The condition of the bond was that the appeal should be prosecuted with effect; that is, that it should be successfully prosecuted. It has not been so prose-

[2] Accord: Hamilton v. Dunklee, 1 N. H. 172 (1818); Olcott v. Lilly, 4 Johns. (N. Y.) 407 (1809).

[3] A portion of the opinion dealing with the question of a variance has been omitted.

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cuted; and the failure so to prosecute it was not owing to any fault on the part of the obligees.

PER CURIAM. The judgment is reversed, with costs. Cause remanded, etc.[4]

GARGAN et al. v. SCHOOL DIST. NO. 15.

(Supreme Court of Colorado, 1877. 4 Colo. 53.)

Appeal from District Court of Weld County.

The plaintiff in the court below obtained a verdict in the penalty of the bond, and damages were assessed in the sum of $443.03. A motion for a new trial was overruled, and judgment entered on the verdict, and thereupon the defendants prayed an appeal to this court.

STONE, J. Goddard and Gargan entered into written contract with the School District, appellee, for doing certain work in the building

[4] In the case of joint contracts at common law, the death of the principal would plainly be no defense for the surety. The principal's estate was discharged by the doctrine of survivorship of all liability to the obligee or promisee. Richardson v. Horton, 6 Beav. 185 (1849).

Many American jurisdictions, however, have modified the law of joint contracts by statutes giving a remedy against the estate of the decedent joint contractor. See note to Harrison v. Field, ante, p. 365. See Code N. Y. § 499; Bowman's Adm'r v. Kistler, 33 Pa. 106 (1859). See Stimson's American Statute Law, vol. 1, p. 453, § 4113.

And, independent of statutory intervention, some American courts of equity hold the estate of the deceased principal liable, though the contract be joint. See Winslow v. Heirs of Parkhurst, and note, ante, p. 368.

Aside from cases of joint liability and the survivorship incident thereto, if a breach of the principal's contract occurs before his death, and his estate would be liable (e. g., simple contract debts due from decedent in his lifetime), so, also, is his surety. Boggs v. State, 46 Tex. 10 (1876); Parker v. Dominick, 105 App. Div. 440, 94 N. Y. Supp. 249 (1905); Johnson v. Bank, 12 Miss. 165, 43 Am. Dec. 480 (1843); Baker v. Elliot, 73 Me. 392 (1882). See, also, the numerous cases on the point that the laches of the creditor in not presenting his claim against the principal's estate does not prevent recovery against the surety.

Ordinarily the estate of the decedent is liable for the breach of all contracts occurring in decedent's lifetime.

Where the principal commits a tort in his lifetime, the action for which does not survive against the principal's estate, the surety is discharged by the principal's death. Melvin v. Evans, 48 Mo. App. 421 (1892).

But if, by statute, the action for the tort survives, the surety is not discharged. State ex rel. v. Soale, 36 Ind. App. 73, 74 N. E. 1111 (1905).

If the breach of the contract occurs after the death of the principal, his estate would be liable on certain kinds of contracts (e. g., debts maturing after death), and the surety's liability is also evident. Baker v. Elliot, 73 Me. 392 (1882); Peabody et al. v. Ohio, for Use, etc., 4 Ohio St. 387 (1854); Elmendorf v. Whitney, 153 Pa. 460, 25 Atl. 607 (1893); City of Great Falls v. Hanks, 21 Mont. 83, 52 Pac. 785 (1898). Contra: State, etc., v. Vananda, 7 Blackf. (Ind.) 214 (1844).

If, however, the estate of the principal is not liable for a post mortem breach of contract (e. g., a contract for personal services or a guardian's liability), neither is the surety. Garrett v. Reese, 99 Ga. 494, 27 S. E. 750 (1896).

The same principle discharges the sureties of a lunatic who has made a contract for personal services. Grove v. Johnston, 24 Law Reports (Ireland) Q. B. Div. 352 (1889).

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of a schoolhouse, and to secure the due performance of the contract on their part they, together with Niemeyer and Getz, as sureties, executed a bond to the district in the penal sum of $1,000.

This action is in debt on the bond, brought against Gargan and the sureties aforesaid (Goddard having died before performance of the contract); the breaches assigned being the failure of Gargan and Goddard in the lifetime of the latter, and of Gargan afterward, to perform certain of the work specified in the contract, and for unskillful performance of portions of what was done, whereby damage accrued, etc.

The pleas are: (1) Nil debet; (2) non est factum; (3) non-performance by plaintiff of conditions as to payment; (4) non-performance as to conditions to be performed by plaintiff respecting the foundation of the building; (5) covenants performed; (6) nul tiel corporation; and (7) set-off.

From the view which we take of this case, under the state of the pleadings presented by the record, we do not deem it necessary to examine in detail all the questions offered for our consideration by counsel for appellants upon the very numerous assignments of error and the elaborate briefs filed in the cause.

The plea of nil debet interposed was, in this action, bad on demurrer; but, having been replied to, the plaintiff was thereby put upon proof of every allegation in his declaration, and the defendants were at liberty to avail themselves of any ground of defense which in general might be taken advantage of under that plea. 1 Chit. Pl. 483.

This plea puts in issue the existence of the debt at the time of pleading, and consequently any matter may be given in evidence under it which shows that nothing was due at that time, as payment, release, or other matter in discharge of the debt. 1 Chit. Pl. 481. And hence under issue made by this plea as it stood, it was competent for the sureties to have shown the death of Goddard, one of the principals in the bond, in discharge of any liability thereafter.

Mr. Chitty lays down the doctrine that, "if a person engage as surety for more persons than one, the engagement is understood to be on behalf of those persons collectively and jointly, and in case of the death of any of them it will not continue on behalf of the survivors." 1 Chitty's Contracts (11th Am. Ed.) 767; Fell on Suretyship, 520.

The doctrine that, whenever a surety becomes bound for the performance of more than one person, his obligation does not extend beyond the death or retirement of any of those for whom he has engaged to be answerable, is established by an almost unbroken line of decisions, both English and American, reaching back for three quarters of a century. And this rule is applied as well to the parties to whom the surety is bound, the obligees, as to those for whom he is bound, the principal obligors.

The reason upon which the doctrine rests, when applied in a case like the one before us, is well expressed by Lord Mansfield in the case of

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Weston v. Barton, 4 Taunton, 673, wherein, after a review of all the preceding cases, he says: "It is very probable that sureties may be induced to enter into such a security by a confidence which they repose in the integrity, diligence, caution and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons in which there are not some possessed of those qualities in a greater degree than the rest, and it may be that the partner dying or going out may be the very one on whom the surety most relied. It would be, therefore, very unreasonable to hold the surety to his contract after such a change."

The leading cases in which this doctrine is enunciated are: University of Cambridge v. Baldwin, 5 M. & W. 585; Simpson v. Cook, 1 Bing. 452; Cremer v. Higginson, 1 Mason, 337, Fed. Cas. No. 3,383; Myers v. Edge, 7 Term R. (Durnford & East) 254; Strange v. Lee, 3 East, 484; Weston v. Barton, supra; Penoyer v. Watson, 16 Johns. (N. Y.) 100; Smith v. Montgomery, 3 Tex. 203.

The only exceptions to the doctrine of these decisions are: First, where the language of the obligation expressly limits the liability, or extends it to survivors, or to any or either of the obligees or principals, whether associated together or otherwise; and, second, where the parties for or to whom the sureties are bound are described as a class, company, bank, or the like, and not to the members or partners nominatim, so as to plainly imply that the security is given to or for the class or body as such regardless of changes in the integral parts. Barclay v. Lucas, 1 Term Rep. 291. There is nothing in the language of the bond to take this case out of the operation of the general rule.

As a general rule such defense should be pleaded specially and on behalf of the sureties alone; but, as we have shown, under the plea of nil debet as it stood in this case, the defense might be made the ground of a proper motion.

The death of Goddard appeared in the evidence of the plaintiff, as well as upon the face of the declaration, and it was not, therefore, necessary for the defendants to introduce proof of the fact. Such being the case, the motion of the defendants for a new trial should have been granted on the ground that the verdict was against the evidence.

A question, however, is made as to whether the pleas interposed were on behalf of the sureties alone, or on behalf of all the defendants.

The record shows that the sureties, Niemeyer and Getz, only, were served with process; that as to the defendant Gargan the return was non est inventus. The "defendants served" appeared by G. W. Miller, Esq., as attorney. The rule to plead was on the "defendants served." The pleas filed were on behalf of "the defendants." These pleas are to be taken as the pleas of the defendants served, and not of all the defendants named to the action. Boilvin v. Edwards, 4 Gilman (Ill.) 119; Chester v. Miller, 13 Cal. 558; Violet v. Waters, 1 J. J. Marsh.

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(Ky.) 303; Hubbard v. Dubois, 37 Vt. 94, 86 Am. Dec. 690; Freeman on Judgments, § 155.

The record should distinctly show the service of process on defendants, or their voluntary appearance. It ought not to be left to inference or conjecture. McCall v. Lesher, 2 Gilman (Ill.) 47; Clemson v. State Bank, 1 Scam. (Ill.) 45.

At a subsequent term of the court—the third term after that to which suit was brought and the process returned—Gargan makes an affidavit in support of a motion for continuance on behalf of "the defendants," and names himself as "a witness and a party." This, however, in no wise necessarily connects him with the pleas which had two terms previously been filed on behalf of the defendants served, nor does it prove that he had appeared to the action. He might well be a witness on behalf of the sureties, and yet not have either appeared or pleaded to the action. To say that he had done either is to indulge in conjecture.

The question raised by want of service of process, or upon doubtful appearance, is a jurisdictional question, affecting, necessarily, the validity of the judgment, and, therefore, such service or appearance cannot be open to doubt or conjecture, but must be made conclusively to appear.

The pleas, therefore, must be held to be the pleas of the sureties alone, and their defense clearly available under the plea of nil debet, which was made to stand as the general issue.

The verdict, being in part for damages accruing on alleged breaches after the death of Goddard, was to that extent unauthorized by the evidence, and the motion for new trial should have been granted.

Gargan not having been served with process, and not having appeared to the action, nor pleaded therein, the judgment was erroneous as to him also.

This error with respect to the judgment against Gargan would in itself be sufficient to reverse the judgment, without reference to errors relating to the case of the sureties.

The judgment being entire, if reversed as to one, must be reversed as to all. Arnold v. Sandford, 14 Johns. (N. Y.) 424; Richards v. Walton, 12 Johns. (N. Y.) 434; Boyce v. Watson, 3 J. J. Marsh. (Ky.) 498; Gaylord v. Payne, 4 Conn. 190; Mumford v. Overseers, etc., 2 Rand. (Va.) 313.

And this is the case, although the error relates only to one. Powell on Appellate Proc. 285.

The judgment of the district court will therefore be reversed.

THATCHER, C. J. I agree that the court below erred in entering a joint judgment against Gargan, Niemeyer and Getz, as the record, properly construed, shows that only Niemeyer and Getz appeared and pleaded to the action, and for this error, I think, the judgment should

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be reversed. In this view Brother ELBERT concurs. As to the liability of the sureties for breaches of the building contract, occurring subsequent to the death of Goddard, no opinion is at present expressed.

BANK OF WASHINGTON v. BARRINGTON et al.

(Supreme Court of Pennsylvania, 1830. 2 Pen. & W. 27.)

GIBSON, C. J.[5] The conclusion at which a majority of the court has arrived enables me to dismiss all the reasons for a new trial but one, with a passing remark—that they have not been sustained. The point on which the cause is to be decided, and which was reserved at the trial, not only for its difficulty, but its importance both in principle and amount, arises out of the following facts: The bank was chartered in 1813, and its utmost duration limited to the 1st of April, 1825. The bond on which suit is brought was executed in 1814, with condition underwritten that Barrington should "well and truly perform the duties of cashier." By the act of incorporation, the president and directors were required to pay annually to the treasurer of the commonwealth 6 per cent. of the whole amount of the dividends, on failure of which for a specified period the charter was thenceforth to become "absolutely null and void and of no effect whatever," and the bank to be "dissolved, unlawful, and unincorporated," except inasmuch as corporate capacity should be necessary to the enforcement of contracts made by it, or with it, before the period of its delinquency. By force of this provision, the charter became forfeited in the beginning of January, 1818, and by an act passed the 2d of February ensuing was "revived and continued in as full force and ample a manner as if no forfeiture had taken place." The directors did not order new securities to be given by the officers, and nearly all the defaults of the cashier were subsequent to the act of restoration.

Whatever may have been the constitutional power of the Legislature to restore the defendant's obligation without their consent, it certainly was not invoked. Provision was made for notes or bonds discounted or received subsequently to the forfeiture; but everything else was left as it had been found, and the point is therefore to be decided on the principles of the common law.

The rule that the liability of a surety is commensurate in duration with the commission of his principal is well settled in United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199, and United States v. Vanzandt, 11 Wheat. 184, 6 L. Ed. 448. The only apparent exception is the case of a direction to the proper officer to take a new security by a given day, which, in United States v. Nicholl, 12 Wheat. 509, 6 L. Ed. 709,

[5] The statement of facts and arguments of counsel have been omitted, and the opinion slightly abridged.

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was held not to discharge the old one. But there the continuance of the old security till it should be actually superseded by the new one was in perfect consistence with the original limitations of the contract: here the question is whether, by one of its limitations, the security had not expired.

By the constitution of this corporation, its existence was subject to be terminated alike by forfeiture of the charter and efflux of time; and for the benefit of each of these as limitations of the term of their liability the sureties had stipulated, not indeed in terms, but tacitly and by irresistible implication from the nature of the contract. They had treated on the basis of corporate existence as it then stood, and in reference to all its incidents. They might have seen, and they are therefore to be considered as having known, that the bank was subject to cease by the happening of a contingency, and that with it would cease their liability. Who can say this did not enter in their estimate of the risk which they consented to take on themselves? They were, in effect, insurers, but without a premium, of the cashier's fidelity; and they are entitled to the benefit of any termination of the risk which may be brought within the letter or the spirit of their contract. Their engagement was without a consideration beneficial to themselves, and it is therefore not to be extended beyond its strict technical import. That they, in fact, supposed their liability to be commensurate with the original charter, does not admit of a doubt; for no one will pretend that an extension of the charter would have operated as a correspondent extension of the security. Such an extension might, in popular language, be a continuance of corporate existence; but, as regards intervening rights, it would, in fact and in law, be a new creation.

Assuredly a renewal of corporate powers extinguished by lapse of time would not be a renewal of the sureties' bonds. Arlington v. Merricke, 2 Saund. 411. And why should the same principle be inapplicable to extinction by forfeiture? It is the fact of extinction, and not the manner of it, which is material to the question. This is perhaps not denied; but the argument is that the Legislature might waive the forfeiture, or at least avert it before the extinction was complete. Was it, however, not complete as to all but new operations? For everything beside the bank had, in the words of the act of incorporation, become "dissolved, unlawful, and unincorporated." Nothing was left it but a capacity to set its house in order. But the extinction of corporate existence may be complete as far as it has gone, without being entire; and if the office was gone as to new operations, so was the liability of the sureties. So that to revive the security as to these, after it had ceased as to all but such as were necessary to close the business, would burden the sureties with responsibilities which had not entered into their stipulations, and bring the point within the principle of United States v. Kirkpatrick, and the other cases of that class.

The Legislature might doubtless have interfered to prevent a forfeiture before one had actually occurred, like medical assistance in

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the case of one whose life has been insured, that must be taken to have been a tacit condition of the contract. But it was as incompetent, had it been so disposed, to divest an interest which was fixed by actual forfeiture, as it was to divest an interest in the termination of the risk by lapse of time, which was fixed from the beginning. As limitations of corporate existence, the difference between expiration and forfeiture was that the one was certain and the other contingent. But when the latter became certain by the happening of the contingency, all difference ceased and the same rule was applicable to both. The Legislature might have waived the forfeiture, had the performance of an act been necessary to take advantage of it; but, unfortunately for the argument, the divestiture of the corporate franchise was consummated by the bare omission.

So far the case seems clear on principle. But this construction of the contract is fortified by close analogies from undoubted authorities. In Wright v. Russel, 2 Black. Rep. 934, security for the faithful service of a clerk to a sole trader was not extended to a subsequent partnership. I am aware that the principle of this case has been questioned, and perhaps with reason, although the ground of variance between the condition and breach as set out, on which it was ultimately rested, is admitted to be a tenable one. In Barclay v. Lucas, 1 T. R. 291, in note, a bond for the fidelity of a son whom the plaintiffs had taken into service in their counting-house and shop was held not to be discharged by the introduction of a new partner. But Lord Mansfield put the case on a presumption of intention deducible from the subject-matter of the contract—fidelity to a house, which might continue for generations, by a succession of partners under the same firm, though none of them should bear the name of any of the original proprietors; and also on public convenience, which required the security to be considered, as what it probably was intended to be, security to the house. Mr. Justice Willis considered it natural, that the service was to be performed in the counting-house, and not to the plaintiff in particular, and he thought the inconvenience there would be in renewing the security with every change of the firm must have been in the view of the parties, and was therefore proper to be considered in expounding their intention; and Mr. Justice Buller put the case on the same ground. But in Barker v. Barker, 1 T. R. 287, such a bond was deemed to be no security for the fidelity of a clerk retained in the employment of the obligee's executor, who had continued the business pursuant to directions in the will, and this because the contract was in its nature exclusively applicable to services which were not to be performed to the obligee, and not to his successor, in perhaps an altered state of the business produced by his death.

Is not that, in principle, the case at bar, in which there has been a similar alteration by the civil death of the bank? Had this corporation, or any of the numerous family of which it was a member, acquired by repeated indulgence an ideal right to a remission of the

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forfeiture, that, like the ideal right to a renewal of a church or corporation lease which has sometimes entered into the consideration of a court of equity, might on the principle of Barclay v. Lucas be fairly presumed to have tacitly entered into the stipulations of the parties. But there had been no instance of forfeiture and remission previous to the execution of the bond, nor has there been but one, beside the present, since. The demise and resuscitation of a bank, under circumstances like the present, are of no ordinary occurrence; nor do they in the least resemble the coming in or going out of a partner, which produces no change in the identity or individuality of the obligee, and which, from its frequency, must necessarily be in the contemplation of those who treat in relation to the firm. The civil, like the natural, death of the obligee dissolves the obligation, although the business be continued on the old footing and under the same authority. The obligation perishes with the obligee; and, being once discharged or suspended, it is gone forever. Even a voluntary suspension of the remedy is attended with the same consequences. 20 Edw. IV, 17; 21 Edw. IV, 36; Dyer, 140. Hob. 10; Cro. Eliz. 150; Cro. Car. 375; Sir W. Jones, 345. But the case of Dance v. Girdler, 1 N. R. 34, is nearer to the present than any of the preceding. There a bond to the trustees of an unincorporated association for the fidelity of one of its officers was determined to be no security for his fidelity after the association had become incorporated, because its provisions were inapplicable to a state of corporate existence, which it was thought could not have been in the contemplation of the parties. Lastly, in Strange v. Lee, 3 East, 484, it was held that the death of even one of two or more obligees, determined the security. * * *

HUSTON, J., dissented. ROSS, J., took no part, not having heard the argument.

Judgment reversed, and a new trial granted.

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CHAPTER IV

PAYMENT OR PERFORMANCE BY PRINCIPAL

BANCROFTE v. WILLET.

(King's Bench, Easter Term, 1624. 1 Rolle, 336, pl. 3.)

If B be arrested at the suit of A and it is returned into the Bench, where B, and C as his bail, become bound in a recognizance, to wit B in £200., being the principal and C, the bail, in £100. that B shall appear at an action to be brought, etc., according to the usual form, and then judgment is given against B in the action; and afterwards a scire facias is brought against B, and C for their several recognizances, who plead the release of A to B, the principal of all debts, duties, judgments, executions and demands: It is a good plea as well for B the principal as for C the bail, because it discharges the debt, and judgment, and the bail can well plead a satisfaction of the judgment, and the release is a satisfaction. Adjudged on a demurrer.[1]

MERRIMACK BANK v. PARKER et al.

(Supreme Court of Massachusetts, 1828. 7 Pick. 88.)

This was an action on a promissory note, dated August 2, 1823, by which Parker, as principal, and the other defendants, as sureties, jointly and severally promised to pay the Merrimack Bank, or order, $600 in 60 days and grace. The writ is dated June 28, 1826.

Parker was defaulted. The other defendants pleaded the general issue.

At the trial before WILDE, J., the counsel for the plaintiffs stated that the action was commenced and prosecuted for the benefit of Francis Kidder, of Andover.

The defense set up was that the note had been fully paid to the bank. From the deposition of the cashier of the bank (taken December 6, 1826) it appeared that more than half of the principal of the note, with interest, had been paid at the bank prior to June 2, 1825, on which day the balance due on the note was paid, and according to the witness' recollection, not by the principal promisor, but by some other person, whom he did not recollect, and that the note was then taken away; that in the summer of 1826, the note was brought to the witness, he

[1] Accord: Year Book, 33 Edw. I (Rolls Ed.) 86.
Performance of a parol contract by the principal is a defense for the surety. Lewis v. Hoare, 44 Law Times Reports (N. S.) 66 (1881).

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was not certain by whom, but thought it was one Kidder of Andover, who requested him to indorse it without recourse to the bank, which the witness did, without consulting the directors and without their knowledge; and that the bank, to his knowledge, had never been authorized by any one to bring a suit on the note in the name of the corporation, unless his indorsing the note had that effect.

The counsel for the plaintiffs then gave in evidence a writing, signed by the directors of the bank, dated December 1, 1827, authorizing Francis Kidder to prosecute this suit for his own use and benefit. On this evidence it was contended that the plaintiffs were entitled to a verdict for the benefit of Kidder as a bona fide holder of the note.

But the judge, thinking the action not maintainable on the evidence, ordered a non-suit, with leave, etc.[2]

PARKER, C. J. The only legal inference which can be drawn from the facts reported in this case is that the note on which the action is brought was paid at the bank by the principal promisor, whose duty it was to pay it; so that it became functus officio, and incapable of transfer or being in any way the ground of action. It is possible it was paid by Kidder, for whose use this action was brought, but there is no evidence that it was so; and, if so in fact, the presumption, without any evidence to the contrary, is that he paid it as the agent of the principal promisor. How otherwise should he have contented himself with merely taking possession of the note and keeping it a year, without any notice or call upon the promisors standing as sureties, or without any attempt to furnish himself with any evidence of transfer from the bank?

The cases cited in support of the action are altogether of a different character. They show an actual or equitable assignment from the payee to the holders, or a payment by some party to the note who stood prior in contract to the party on whom he calls. The law aids such transfers or assignments, but will not assist one who has paid the debt of another, and taken up the security, in his claim upon other parties to the note, after the failure of him on whose credit it was paid. Such is the appearance of this transaction. If Kidder paid the balance of the note with his own money, it was undoubtedly at the request of Parker and for his benefit, and probably for the very purpose of discharging his sureties. The plaintiff lay by a year, when, Parker having failed, he attempts to revive the note under color of authority from the bank.

Motion to take off non-suit overruled.[3]

[2] The arguments of counsel are omitted.

[3] Accord: Lozier v. Graves, 91 Iowa, 482, 59 N. W. 285 (1894).

In Hiller v. Howell, 74 Ga. 177 (1884), the court said: "We have been unable to find any authority that would release a surety, because an incomplete tender, made by his principal, had been rejected by the creditor. The cases, as we take it, are the other way, and this for very obvious reasons. The surety engaged that his principal should perform all the terms and discharge all the obligations of his contract, not a part of them only; that he should

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JOHNSON v. MILLS et al.

(Supreme Judicial Court of Massachusetts, 1852. 10 Cush. 503.)

METCALF, J.[4] A new trial must be ordered, in consequence of the instructions that were given to the jury. They should have been instructed, we think, as follows: If Mills carried the money to the plaintiff, and would have paid it to him, on his requiring payment, but the plaintiff thereupon made an agreement with him, without consent or knowledge of his sureties, that he might keep back the money for a time, and pay his own debts with it, and if he did so, then the sureties had a good defense. And we are of opinion that the jury would have been warranted in finding all these facts on Mills' testimony. At least, it was for them to decide what inferences of fact might or might not be properly deduced from that testimony.

The argument for the plaintiff is that he did not give time to Mills by an obligatory agreement which deprived him of the power of immediately suing on the bond (Orme v. Young, Holt, N. P. 84); nor by an agreement for the breach of which Mills would have had a remedy either in law or equity (Greely v. Dow, 2 Metc. 176); and therefore the sureties are not discharged (Pitman on Prin. & Surety, 167 et seq.). But we think this doctrine is not applicable to the present case. No time for the payment of the collected taxes was mentioned in the condition of the bond; so that the agreement of the plaintiff with Mills was not, in strictness, an agreement to extend the time of payment. It was, in effect, a lending of money to Mills, to be used for his own purposes, for the payment of which the sureties on the bond did not undertake. Whether such an agreement between the treasurer and collector would have exonerated the sureties if the bond had been given to the town, as it ought to have been, instead of the treasurer, it is not necessary to inquire.

New trial in this court.[5]

make a complete tender, and not a mere semblance of one. If he failed in his duty in this respect, no title to the articles passed to the creditor. It remained in the principal debtor, and the articles were at his risk. The creditor, in refusing, has not increased the risk or liability of the surety. He has only availed himself of rights under the law in reference to which the contract was made, and the surety cannot impute to him his own want of vigilance in looking after the performance of the contract on the part of his principal. As to the insufficiency of an uncertain or partial tender, see Fridge v. State, Use of Kirk, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463. What was said obiter by Bleckley, J., in Bonner v. Nelson, 57 Ga. 437, is not in conflict with, but in accordance with, the views here expressed."

[4] The statement of facts is omitted.

[5] Accord: Spurgeon v. Smitha, 114 Ind. 453, 17 N. E. 105 (1888), repudiating expressly the contrary doctrine of Clark v. Sickler, 64 N. Y. 231, 21 Am. Rep. 606 (1876); Joslyn v. Eastman, 46 Vt. 258 (1873). See Brandt's adverse criticism of Clark v. Sickler, in Brandt on Suretyship, p. 714, note 19;

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RUBLE v. NORMAN.

(Court of Appeals of Kentucky, 1871. 7 Bush, 582.)

Judge PETERS delivered the opinion of the court.

Appellant in his answer, to which a demurrer was sustained, alleges that T. G. Morton was the principal obligor in the note sued on, and that he was surety, which fact appellee knew when the note was executed; that about the 12th of August, 1868, appellee made a written contract with said Morton, whereby he purchased sixty well-fatted hogs from Morton, which he then owned, to be received between the 8th and 10th of December, 1868, for which appellee was to pay the market price, and the note sued upon, on the delivery of the hogs, was to be delivered up by appellee as paid, and received by Morton as part pay for the hogs; that he (appellant) was instrumental in procuring said sale to be made, in order to secure the payment of said note and to relieve himself from his responsibility therefor; that appellee and Morton subsequently changed the place of the delivery of said hogs to Louisville, and the time to the 25th of December, 1868, without appellant's knowledge, but that at the time and place last agreed upon Morton did deliver said hogs to appellee, and after having received them he permitted Morton to sell them and to retain the price, which was $1,200, except $425, which Morton paid over to appellee, and said $425 was credited on said note; that said hogs were of value greatly more than sufficient to pay said note, and that appellee permitted Morton to withhold the money received for them, or so much thereof as was necessary to discharge said note, without his knowledge or consent; and therefore insists he is released from any obligation to pay said note, Morton being insolvent.

Whether the demurrer was properly sustained to the answer is the only question presented by this appeal.

We are not aware that this question has heretofore been adjudicated by this court. In Miller v. Stewart, 9 Wheat. 680, 6 L. Ed. 189, the Supreme Court of the United States held that the surety is discharged, not only by payment of the debt, or the release of the principal, but by any material change in the relations between the principal and the party to whom he owes the debt, and that the surety cannot be held bound in such case by showing that the change was not injurious to him; for he had a right to judge for himself of the circumstances

Curiac v. Packard, 29 Cal. 194 (1865); Appleton v. Donaldson, 3 Pa. 381 (1846); Mitchell v. Roberts (C. C.) 17 Fed. 776 (1883).

But an offer not a legal tender works no discharge. Bonner v. Nelson, 57 Ga. 433 (1876); Liebbrandt v. Myron Lodge, 61 Ill. 81 (1871).

Likewise a tender made by the surety, if not accepted, discharges him. O'Conor v. Morse, 112 Cal. 31, 44 Pac. 305, 53 Am. St. Rep. 155 (1896); Hayes v. Josephi, 26 Cal. 535 (1864).

On duty of creditor, receiving money from principal, to apply to indebtedness in relief of surety, rather than to other indebtedness, see note, 18 H. L. R. 399.

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under which he was willing to be liable, and to stand upon the very terms of his contract. In 2 Parsons on Contracts, 18, it is said: "Anything that operates as a novation discharges the surety; so if a new note be given in discharge of a former one." A fortiori, it would seem that if property of value more than sufficient to pay the debt be delivered to the creditor in discharge thereof, and he afterward permitted the principal debtor to sell the property and retain the price, the surety will be discharged; for he thereby contracts a new debt with his principal debtor, to which the surety is no party, and he cannot hold him bound for the former debt, because it has been satisfied.

Taking, therefore, the allegations of the answers to be true, as must be done in adjudicating on the demurrer to it, they constitute a good defense to the action.

Wherefore the judgment is reversed, and the cause is remanded, with directions to overrule the demurrer to the answer and for further proceedings consistent with this opinion.[6]

DIRECTOR OF PUBLIC WORKS v. LEWIS et al

(High Court of Orange River Colony, 1908. Orange River High Court Reports, 1908, p. 14.)

The plaintiff sued the defendants as sureties and co-principal debtors on three promissory notes. The two latter defendants appeared in person and urged that two of the notes were not yet due, and that the third should have been sued upon in the magistrate's court, as the amount was within his jurisdiction.

The principal debtor on all three notes was insolvent.

MAASDORP, C. J. On the point raised by the plaintiff the court is of opinion that the contention cannot be upheld. Sureties for a debt payable upon a fixed date only become liable if upon that date the debt remains unpaid. They only bind themselves to make payment on that date. In the decisions quoted by counsel the debt was made subject to a certain period of notice. All that was decided in those cases was that, if the principal became insolvent, he was not entitled to the stipulated notice, because the time originally allowed him was based on his credit, which had disappeared through his insolvency. His credit

[6] If the creditor has received a worthless check of the principal, and notifies the surety of its non-payment, the latter is not discharged. Hogan v. Kaiser, 113 Mo. App. 711, 88 S. W. 1128 (1905).

Payment by forging paper in the surety's name is no discharge of the surety. See note, 14 H. L. R. 548.

If the creditor is afterwards compelled to restore to the assignee in bankruptcy a payment made by the debtor and afterwards avoided by bankruptcy, the surety is not discharged. Swarts v. Fourth, etc., Bank, 117 Fed. 1, 54 C. C. A. 387 (1902). Unless the creditor has reasonable ground to believe that the principal was insolvent and that the payment was made in fraud of the bankrupt act. Northern Bank v. Cooke, 13 Bush, 340 (1877).

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was supposed to be good for the period of notice allowed by the agreement. When he became insolvent, his credit was gone. In this case the sureties are only liable from a particular day. It is not a question of notice, nor of the solvency of the principal debtor. The defendants are right in their contention that as to two of the notes the period has not arrived and they are not liable. Provisional sentence is granted on the third note with magistrate's court costs.

FAWKES, J., concurred.

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CHAPTER V

RELEASE OF PRINCIPAL

Ex parte GLENDINNING.

In re RENTON.

(Court of Chancery, at Lincoln's Inn, 1819. Buck, Bankr. Cas. 517.)

This was an appeal from the decision of the late Vice Chancellor, who had ordered the petitioner's proof for £350. to be expunged. The petitioner was the indorsee and holder of a bill of exchange for £350., dated Febuary 27, 1815, and accepted by the bankrupt for the accommodation of the drawer. The petitioner, in his examination before the commissioners, deposed that some time previous to his receiving the said bill for £350. from one Rowe, the drawer, Rowe informed the petitioner that the bankrupt had promised to lend him £350. for three years, but was not then able conveniently to do so, but had offered to lend him his acceptance for £350. at six months, and asked the petitioner whether he would give the bankrupt as much cash as he might want out of it, and put the rest to his account. To which the petitioner agreed, whereupon an arrangement took place between the petitioner and the drawer, and the drawer indorsed the bill to the petitioner. The petitioner further deposed that, when the bill became due, it was dishonored; that on the 18th of November, 1815, he proved it under the bankrupt's commission, and that previously to his proof he had arrested Rowe, as the drawer and indorser of the bill; that he had been informed by his attorney, and believed, that a cognovit was taken in the action from Rowe; and that afterwards the petitioner had been applied to by Rowe to come in as a creditor under an assignment of his effects, and which the petitioner had accordingly executed in the month of October then last. The petitioner admitted that he had not previously obtained the consent of the bankrupt or of the assignees for that purpose.

It also appeared that the petitioner had given the indulgence to the drawer upon an understanding that he reserved the full benefit of his proof against the bankrupt's estate, but such benefit was not reserved by the trust deed.[1]

THE LORD CHANCELLOR. I perfectly remember when it was for the first time laid down in the courts of law that, where there was an acceptor without effects, notice of the dishonor of the bill need not be given to the drawer. This rule being once established, there naturally sprung out of it a new doctrine as to the respective liabilities of the

[1] The arguments of counsel are omitted.

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drawer and acceptor in cases where the indorsee had notice that the acceptance was given merely for the purpose of accommodating the drawer. And the cases go the full length of determining that, as between the drawer and acceptor and indorsee with notice, the drawer should be considered as the principal; and if the indorsee give time to the drawer, that shall discharge the acceptor. These cases were shaken by the authority of Sir James Mansfield, which in this and in every other court is entitled to be received with the greatest respect. But I observe in the printed report of the case that not one of the numerous decisions of this court were called to that judge's attention. Now the practice is quite familiar in this court, where the indorsee, with notice of the accommodation transaction, has recovered upon the acceptance, to allow the acceptor to prove for the amount under the drawer's commission. I think this equity naturally grew out of the doctrine of not requiring notice to be given when the acceptor had no effects. Although no man more than myself laments the introduction of that doctrine, yet I cannot overturn what has been for so many years acknowledged and acted upon as part of the general mercantile law of the country. If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor; but if the creditor do not reserve his remedies, the deed will operate as a discharge to the sureties, which rule I conceive is founded upon this maxim, that it is against conscience and equity that you should put persons in a situation in which they have not contracted to be placed. It may be said the surety is not injured by the creditor's arrangement with the debtor, and in many cases the compromise may happen to be extremely advantageous to him. But this is no answer to a surety who stands upon his contract. Besides, it is evident creditors would not pursue their actions with the same pressure and activity, if they were not urged on by the consideration that any laches on their part would discharge the sureties. Ever since Mr. Richard Burke's Case, the law has been clearly settled, and it is now perfectly understood, that unless the creditor reserve his remedies he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise; for evidence cannot be admitted to explain or vary the effect of the instrument. I therefore feel myself bound to declare, in conformity to the decisions of my predecessors, that the trust deed operated as a discharge to the acceptor.

Petition of appeal dismissed, with costs.[2]

[2] The creditor may release the principal debtor by specialty, by accord and satisfaction, or by novation. Commercial Bank, etc., v. Jones, [1893] A. C. 313.

Where the creditor discharges the debtor from liability, he discharges the surety also, unless in the discharge the creditor reserves the right to hold the

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JONES v. WARD.

(Supreme Court of Wisconsin, 1888. 71 Wis. 152, 36 N. W. 711.)

LYON, J.[3] Briefly stated, the case, so far as there is any controversy, is as follows: The defendant became surety for Cook's debt to the plaintiff, and Cook indemnified him by executing to him a chattel mortgage on certain property. The plaintiff released Cook from liability for such debt, without the consent of the defendant. Afterwards defendant sold his security to McArthur, without the consent of the plaintiff, for the consideration (as the circuit court found) of $475.

The only question in the case is: Did the release of Cook also release the defendant, his surety? The general rule undoubtedly is that the release of the principal debtor, without the consent of the surety, releases the surety. But if the surety is fully indemnified against loss by reason of having become such, a release of the principal without payment of the debt does not release the surety. This is the rule

surety, or unless the surety consents to the principal's discharge. California Bank v. Ginty, 108 Cal. 148, 41 Pac. 38 (1895); Nevill's Case, L. R. 6 Ch. App. Cas. 43 (1870). In Nevill's Case, the reason for the rule in the case of several contracts is thus stated: Sir G. Mellish, L. J., said: "It is clear that, even where the principal debtor is released by a formal instrument under seal, if the remedy against the surety is reserved the surety can be sued. The reason why a simple release of the principal debtor discharges the surety is that it would be a fraud on the principal debtor to profess to release him, and then to sue the surety, who in turn would sue him; but, where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the court will give effect to the intention of the parties by construing the release as a covenant not to sue the principal debtor."

A reservation of remedy was also effectual to prevent a discharge of the surety in Kearsley v. Cole, 16 M. & W. 127 (1846); Owen v. Homan, 4 H. L. Cas. 997 (1853), obiter.

"In Solly v. Forbes, cited and approved by Wilde, C. J., in Thompson v. Lack, 3 Com. B. 551, it was authoritatively decided that a release of a joint debtor or surety might be qualified and prevented from operating a release of a co-debtor or surety. And Patterson, J., in North v. Wakefield, 13 Q. B. 541, said: 'Now the deed contained an express clause that the release to Goddard should not operate to discharge any one jointly or otherwise liable to plaintiff for the same debts. It is plain, therefore, that it did not release the defendant. The reason why a release to one debtor releases all jointly liable is, unless it be held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply when the debtor released agrees to such a qualification of the release as will leave him liable to the rights of the co-debtor.'" McKinstry, J., in Northern Insurance Company v. Potter, 63 Cal. 158 (1883).

"It is undoubtedly true that, where several persons are liable jointly, or jointly and severally, a release of one is a release of all. This principle is entirely independent of any doctrine peculiar to the law of principal and surety." Per Stirling, J., in Re Wolmershausen, 62 Law Times (N. S.) 541 (1890).

The release of one co-surety will in like manner discharge his co-surety, by destroying the latter's equity of contribution. Mercantile Bank, etc., v. Taylor, [1893] L. R. App. Cas. 317.

[3] Only the opinion of the court has been reprinted.

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laid down in Fay v. Tower, 58 Wis. 286, 16 N. W. 558, as applied to a case in which an unauthorized extension of credit had been given to the principal. Manifestly the same rule should be applied where the surety is absolutely released from the debt. The rule is founded upon a very plain principle of justice. To illustrate: A. becomes security for B. to C. for the payment of $1,000. B. puts property into the hands of A., worth $1,000, to indemnify him against loss because of the obligation thus assumed by him. C. releases B., the principal debtor, from all liability on account of the debt, but receives no payment thereon. A., the surety, then sells the pledged property for $1,000 and retains the proceeds. It is entirely reasonable and just that, notwithstanding the release of the principal debtor, C. should have his remedy against the surety for the amount realized by him in the sale of the pledged property. Such, we think, is the law. It seems to us that we have here just such a case.

By the Court. The judgment of the circuit court is affirmed.

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CHAPTER VI

SET-OFF OR COUNTER-CLAIM OF PRINCIPAL

WATERMAN v. CLARK et al.

(Supreme Court of Illinois, 1875. 76 Ill. 428.)

Appeal from the Circuit Court of Hancock County; Hon. Joseph Sibley, Judge, Presiding.

Mr. Justice SHELDON delivered the opinion of the court.

This was an action upon a promissory note, of which the following is a copy, to wit:

"$124.49. Warsaw, Ill., Feb. 16, 1870.

"Three months after date, we, or either of us, promise to pay to the order of A. M. Waterman $124.49, for value received, and with interest at the rate of ten per cent. per annum from date.

"A. J. Clark.
"Wm. N. McCall."

The error assigned is the overruling of a demurrer to defendants' fourth plea.

The plea, in substance, was that Waterman, the plaintiff, on the 1st day of December, 1869, owned and was running a distillery, and took certain cattle and hogs of defendant Clark to take care of, feed and fatten, at plaintiff's distillery, at a certain price per head per month; that after plaintiff so having the stock for three months, Clark, finding that they were not being fattened, but had been and were being greatly injured and damaged for want of proper care and food at the distillery, demanded a return of the stock, which the plaintiff refused to deliver to Clark, unless he would execute the note in suit; and thereupon the defendants, protesting that there was no consideration for the note, and to prevent further injury and damage to the stock by plaintiff's detention thereof, executed the note, Clark as principal and McCall as surety; that the stock, while in the possession of plaintiff, were not taken good care of, nor were they fattened, but were injured and damaged by the negligence of plaintiff, and by reason of his feeding of the same with improper and unwholesome food, in the sum of $300, which the defendants claimed they were entitled to recoup to the amount of the note.

The objections taken to the plea are:

First. That the matter, in respect to which the damages are sought to be recouped, does not arise between the parties to the record, it arising between the plaintiff and one of the defendants, not both; that the same rule should apply to recoupment as to set-off. The objec-

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tion would be valid if set-off and recoupment were governed by the same rules. But such is not the case. They depend upon quite different principles. In the case of recoupment, a claim originating in contract may be set up against one founded in tort, and vice versa. Streeter v. Streeter, 43 Ill. 157. The cross-demand must proceed from the same subject-matter as the plaintiff's right of action, and the defendant cannot, as in the case of a set-off, recover any excess in his favor. He uses his claim in mitigation of damages, by way of reducing the amount of the recovery. It is a defense here against the note, to be availed of as any other defense against the note itself. We conceive it to be no more necessary here that both the defendants should have sustained the damages to be recouped than, in case there had been pleas of the want or failure of consideration for the note, it would have been essential that the principal and surety in the note should both have experienced the loss arising from the want or failure of consideration. In such case, the principal alone would be the one injured by the want or failure of consideration, yet the right of defense in favor of both would be undoubted. The surety is not further bound than the principal, and is entitled to the same defense.

It is sufficient for recoupment that the counter-claims arise out of the same subject-matter, and that they are susceptible of adjustment in one action. Stow v. Yarwood, 14 Ill. 424. We perceive no reason why, in an action on a promissory note given by principal and surety on a contract of the principal, it is not competent to recoup the damages of the principal growing out of the contract to the same extent as if the note had been given by the principal, and he alone were sued. In the case of McHardy v. Wadsworth, 8 Mich. 350, the precise question here raised was adjudged in favor of the right of recoupment, and that decision meets our full concurrence.

Second. The second objection is that the plea sets up, by way of bar to a recovery on the note, matters of which the party had full knowledge when the note was executed.

We do not consider that the mere giving of the note for the feed of the stock should be held a bar to Clark's claim for damages caused to the stock by reason of the manner in which they had been fed, although he was aware of the damage at the time. We can assign to it no higher effect than as an admission of the amount due, and evidence, but not conclusive, of a settlement or waiver of any claim for damages.

Third. The third and last objection is that recoupment is a defense under the general issue. This was not assigned as cause of demurrer. Our statute requires the defense of the want or failure of consideration of a promissory note to be specially pleaded; in view whereof we regard the claim of recoupment as being properly set up by plea, thereby apprising the plaintiff in advance of trial of the matter of defense to the note.

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We perceive no error in overruling the demurrer, and the judgment is affirmed.

Judgment affirmed.[4]

GRAFF, to Use of MOSES, v. KAHN.

(Appellate Court of Illinois, 1886. 18 Ill. App. 485.)

MORAN, J. Plaintiffs in error brought an action upon an attachment bond against Kahn, who signed the bond, claiming special damage. The bond was given in a suit of Benjamin v. Graff, and after the suit was ended and the attachment quashed Graff assigned the bond to Moses and Newman.

The question to be determined arises upon the defendant's third plea, which was as follows:

"(18) Third plea: And for a further plea, actio non, because the supposed writing obligatory in said amended declaration was given and executed for the benefit and on behalf of said William J. Benjamin, therein mentioned, who was the real party in interest in said attachment suit, and that this defendant was simply a surety on said supposed writing obligatory for the performance by said Benjamin of the conditions of said writing obligatory, and had no interest therein or in said attachment suit.

"(19) And said defendants further say that before and at the time of the execution of said supposed writing obligatory in said amended declaration mentioned, and before and at the commencement of this suit, the said plaintiff was and still is indebted to the said Benjamin in the sum of $696, for goods sold, and for which said Benjamin recovered a judgment against said Graff on September 16, 1884, and the costs of suit, which judgment remains unsatisfied; that said Graff is, and at the commencement of this suit and for a long time prior thereto has been, utterly insolvent; which said sums of money exceed the damages by reason of said supposed breach, etc., and said defendant is ready and willing, and hereby offers to set off and allow to the plaintiff any damages occasioned by the supposed breach in said declaration mentioned, etc."

To this plea plaintiff demurred, the demurrer was overruled, and, plaintiff electing to stand by demurrer, there was judgment for defendant. The overruling of the demurrer is assigned for error.

The plea presents the question whether a surety, when sued alone, upon a joint and several undertaking, can set off against the plaintiff a claim due from the plaintiff to his principal, without showing that the claim has been assigned to him by the principal, alleging that he has the concurrence and assent of the principal in so setting off the claim.

[4] Accord: Aultman, etc., Co. v. Hefner et al., 67 Tex. 54, 2 S. W. 861 (1886), breach of warranty.

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It is settled in this state that the right of set-off is not limited to cases of demands between all the parties to the suit. It exists where there are mutual debts between the real parties in interest. In Himrod et al. v. Baugh, 85 Ill. 435, it was held that in a suit against a party and his sureties a debt or demand due from the plaintiff to the principal defendant, he being the real party in interest, may be set off. After citing a number of authorities which, the court state, recognize an exception under such circumstances to the general rule that joint and separate debts cannot be set off against each other, the court say: "It seems to be in consonance with the equitable principles which so largely govern the relations of principal and surety, and we are struck with the fitness of allowing whatever, not merely personal, would be matter of defense for the principal debtor, were he sued alone, to be admitted as a defense in favor of the principal and surety, when they are sued together."

The same rule was applied in Engs v. Matson, 11 Ill. App. 639, and in Hayes et al. v. Cooper, 14 Ill. App. 490. In all these cases, as well as in all the cases cited in the opinion of Mr. Justice Sheldon in Himrod v. Baugh, the principal was a party defendant, with the sureties, and joined with them in the plea of set-off. There is nothing in those cases from which it can be implied that a surety, when sued alone, may, without the assent of the principal, set off a debt due the principal from the plaintiff in the suit, to discharge him, the surety, from his liability. On principle it is difficult to concede such right to the surety. It is the right of the principal to elect for himself whether he will discharge a claim which he holds against the obligee in the bond by offsetting it against his liability to such obligee. If the surety has the right to set off such a claim without the concurrence of the principal, then he has the right to set off a claim that is larger as well as one that is less than the penalty in the bond, or the amount of damages claimed, and thus he might sacrifice his principal's right of action for $1,000, in discharging a liability against him of $100 or less.

There could be no judgment on the plea of set-off for any excess over the plaintiff's claim; for the surety could have no right to a judgment in his name for such excess, and the principal could not have a judgment in his favor in a suit where he was not a party. A legal demand cannot be split up and made the basis of two actions. Set-off is but a cross-action, and a claim which goes to judgment upon a plea of set-off is as fully barred as if the same claim went to judgment in a separate action brought thereon. Forbes v. Jason, 6 Ill. App. 395.

Again, the payment of the claim set forth in this plea of set-off, by the obligee in the bond, by allowing it to be set off against his damages, would be no protection to him in an action upon the claim by his creditor, the principal in the bond, for the reason that no one can be bound by a judgment to which he is neither party nor privy.

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This question was considered by the Court of Appeals of New York, in the case of Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355. There an accommodation indorser sought to avail himself, in a suit upon the note, of a breach of warranty as to the quality of the goods for which the note was given. The court, after showing that defense was not failure of consideration for the note, but setting up a counter-claim of the principal maker against the payee of the note, says: "In the case which was shown on the trial, there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced, by applying toward its satisfaction the damages which appear to be due to Van Pelt (the principal in the note) for the breach of warranty. It is, however, an equity in which Van Pelt is interested to as great and possibly to a greater extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected." The claim sought to be set up by the surety in that case was more strictly in the nature of a recoupment than of a set-off. It would seem to go more toward a reduction of the liability on the note, by showing a failure to perform the undertaking which was the consideration of the note. Such a defense by the surety presents a stronger basis than does an attempt to use a distinct claim of his principal as a set-off.

In the case of La Farge v. Halsey, 1 Bosw. N. Y. 171, where the sureties on a lease claimed the benefit in and sought to set off, in a suit against them for rent due, a claim of the lessee against the lessor for damages, the court said: "If, by reason of any fact stated as part of this defense, Laura Keene (the principal in the lease) might have set up a counter-claim or recoupment, these defendants cannot. She has assigned no such claim to them, and without that they have no right to use what is in her a distinct cause of action, nor to use any part of it for their own benefit. If they are compelled to pay the rent, they must seek reimbursement from her, and she will have her recourse to the plaintiff for any damages she has sustained. That claim for damages these defendants have no right to diminish nor impair; and if she were to prosecute such claim, nothing done or proved by these defendants could be permitted to diminish her recovery."

In Winston v. Metcalf, 6 Ala. 756, the surety on a note was allowed to set off the claim of his principal against the payee of the note; but the plea of set-off expressly alleged that it was with the concurrence and assent of the principal, and the note which constituted the set-off was in the plea offered to be produced in court. The court said: "The principal debtor is liable to indemnify his surety whenever the latter pays the debt; and when the former has procured a valid set-off, we perceive no sound reasons why the surety should not be permitted, with his consent and concurrence, to enforce it in the same manner as if the suit was against both jointly. The case of Lyon v.

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State Bank [1 Stew. 442] does not assert a principle different from that now held; for there no assent of the principal debtor was shown that the money due to him by the bank, and held in deposit, should be applied in discharge or as a set-off of the debt."

In B. & O. R. R. Co. v. Bitner, 15 W. Va. 455, 36 Am. Rep. 820, the precise question here arising was decided. A surety, who was sued alone, pleaded as set-off a claim of his principal for wages due him for services rendered to the plaintiff in the suit on the bond. The plea was held bad; the court saying: "It is true this court did decide in the case of B. & O. Railroad Co. v. Jameson, 13 W. Va. 833, 31 Am. Rep. 775, that in a suit of this character on a bond, like the one sued on in this case, the principal in the bond, when sued, could plead as a set-off his services rendered as an agent of the plaintiff. But this by no means establishes that the surety, when sued alone on a joint and several obligation, can plead as a set-off any demand due from the plaintiff to a person not a party to the suit, even though that person stands in the relation of principal to the defendant as a surety." See, also, Springer v. Dwyer, 50 N. Y. 19; Sheldon on Subrogation, § 101, and cases cited in notes; Brandt on Suretyship and Guaranty, § 203.

On principle and authority, therefore, we think it clear that, where a surety on a note, bond or other obligation is sued alone, he can plead as a set-off a demand due to his principal only where he shows that the demand has been assigned to him, or that he makes the set-off with the concurrence and consent of his principal, and such concurrence and consent must be evidenced in such manner as to bind the principal. The plea of set-off of defendant Kahn was defective, and for the error in overruling plaintiff's demurrer to said plea the case must be reversed and remanded.

Reversed and remanded.[5]

LASHER, Respondent, v. WILLIAMSON et al., Appellants.

(Court of Appeals of New York, 1874. 55 N. Y. 619.)

Appeal from judgment of the General Term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon the decision of the court upon trial without a jury.

[5] Contra: Bronaugh v. Neal, 1 Rob. (La.) 23 (1841).
When the principal and the surety are co-defendants, and the principal pleads as a set-off a collateral debt, the surety is, of course, relieved to the extent of the set-off. Hollister v. Davis, 54 Pa. 508 (1867). Brandt (section 259) says that "the weight of authority is that he may so avail himself of such set-off." But this statement is too general to be accepted, without regard to local statutes as to set-off.

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This action was brought against defendants, as sureties of one Bernard Gibbs, to recover rent alleged to be due upon a lease of certain premises from plaintiff to said Gibbs.

The facts appear sufficiently in the opinion.[6]

JOHNSON, J. The defendants and appellants were sureties for one Gibbs, to whom the plaintiff had executed a lease under seal of certain premises, and they had by an instrument under seal covenanted that Gibbs should pay the rent, and that if he should be in default they would pay the deficiency. In answer to the plaintiff's action for the unpaid rent, the defendants gave evidence tending to show that, as part of the arrangement between Gibbs and the plaintiff, the latter had verbally agreed with Gibbs to furnish to him during the period of the lease a certain quantity of property to be stored upon the described premises at an agreed price, and that he had furnished only a part of the quantity promised, and failed to furnish the residue. Assuming, in favor of the appellants, that no objection to this proof can be sustained on the ground that it is supported only by unwritten evidence, I am yet of opinion that it gives them no defense or counterclaim available in this action. It was the promise to furnish the storage which may be regarded as forming part of the consideration for the agreement of Gibbs. The breach of that promise gave him a cause of action against the plaintiff, but this cause of action in favor of Gibbs cannot be available to the appellants. It belongs to Gibbs and not to them. The case falls within the principle of Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355.

The non-performance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action, which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively, or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants have no control over him in this respect, and cannot borrow and avail themselves of his rights.

The judgment must be affirmed. All concur.

Judgment affirmed.[7]

BANKS v. PIKE et al.

(Supreme Court of Maine, 1839. 15 Me. 268.)

This was an action on a note of hand, and came before the court on a statement of facts. The note was made to the plaintiff, or her order, by Dominicus Pike, as principal, and by the other defendant

[6] The arguments of counsel are omitted.

[7] Accord: B. & O. R. R. v. Bitner, 15 W. Va. 455, 36 Am. Rep. 820 (1879), where a station agent's surety was not permitted to set off the claim of his principal for services in an action on a bond to account for moneys received as such agent.

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as surety. D. Pike filed in set-off his own individual account against the plaintiff, claiming an amount exceeding the note. The question submitted was whether the defendants were entitled to the set-off.

Fairfield & Haines, for plaintiff.

At common law there was no set-off allowed of unconnected claims. Each party was driven to his action. The law of set-off before judgment is regulated entirely by statute. St. 1821, c. 59, § 19, speaks only of demands between the parties to the suit; and by this is intended the identical parties to the action—a mutuality of demands. The statute also provides that in such case the defendant shall have judgment for any balance found in his favor, in the same manner as if he had brought his action therefor. The consequence would be that if this set-off be allowed that one of the defendants would recover a sum of money against the plaintiff, when she was never indebted to him. Walker v. Leighton, 11 Mass. 140; Sherman v. Crosby, 11 Johns. (N. Y.) 70; Palmer v. Green, 6 Conn. 14; Ross v. Knight, 4 N. H. 236; Osborn v. Etheridge, 13 Wend. (N. Y.) 339.[8] * * *

WESTON, C. J. The provisions of the law in respect to accounts in offset (St. 1821, c. 59, § 19) cannot be carried out, unless the parties having cross-demands are identical. The party defendant is to recover the balance, if his demand proves to be greater than that of the plaintiff, in the same manner as if he had brought an action therefor. One of the defendants has no interest in the account filed here, which overbalances the note sued; and there would be no propriety in rendering judgment for that balance in favor of both defendants. This is admitted; and the counsel for the defendants claim, therefore, the allowance of the account only to the amount of the note. But the manifest intention of the statute was to make an end of the whole matter, and not to split up the account, and leave the balance open to future litigation. This case is precisely like that of Walker v. Leighton et al., cited in the argument, where the offset, under a similar statute in Massachusetts, was disallowed. The claim of offset is not sustained; and, upon the facts agreed, there must be judgment for the plaintiff.

ARMSTRONG v. WARNER et al.

(Supreme Court of Ohio, 1892. 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466.)

Error to the Superior Court of Cincinnati.

The original action was brought in the Superior Court of Cincinnati, by Hulbert H. Warner, doing business as H. H. Warner & Co., against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, William J. M. Gordon, and David M. Hyman, trustee for the benefit of Gordon's creditors.

[8] Part of the arguments of counsel are omitted.

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The object of the suit was to establish certain set-offs against obligations which the bank held against Warner. Upon the trial, at special term, the plaintiff obtained judgment allowing the set-offs, which was affirmed at general term; and to reverse those judgments the present proceeding in error is prosecuted by Armstrong, the receiver of the bank. A statement of the facts necessary to a proper understanding of the questions in the case will be found in the opinion.[9]

WILLIAMS, J. The general ground upon which the reversal of the judgments below is sought, and the only one advanced by counsel in the argument, is that the facts established by the evidence do not entitle the plaintiff to the set-offs allowed him. The evidence is embodied in a bill of exceptions which was properly taken; and there appears to be neither substantial conflict in the evidence nor material controversy about the facts of the case. The facts are substantially as follows:

The plaintiff, Warner, was indebted in the sum of $4,067.82, on a draft drawn by him February 19, 1887, on the defendant Gordon, and accepted by the latter for Warner's accommodation, payable four months after date, at the American Exchange National Bank, New York. On the 18th of June, 1887, being a few days before the maturity of the draft, Warner drew his check on the Bank of Monroe, of Rochester, N. Y., where he had funds, for $4,067.82, the precise amount of the draft, and forwarded the same to Gordon, to enable him to meet the draft at its maturity. The check was received by Gordon, in Cincinnati, and on the afternoon of June 20, 1887, was presented by him at the counter of the Fidelity National Bank of that city, which declined to cash it, but carried the amount to the credit of Gordon on his deposit account with the bank, upon the agreement that Gordon should accept New York exchange to the amount of $3,200, and the balance should remain to his credit and not be immediately drawn out. Thereupon the Fidelity National Bank, on Gordon's check, issued its draft to him on the First National Bank of New York City, for $3,200, leaving a balance of $867.82 of the Warner check standing to the credit of Gordon. The Fidelity Bank had no funds in the First National Bank of New York City, and, when the draft for $3,200 was presented, payment was on that account refused; and the draft has since remained in the hands of Gordon and the trustee for the benefit of his creditors. At the time the Fidelity Bank received the Warner check, and issued the draft for $3,200, it was insolvent, which fact was known to the managing officers of the bank, and to those who transacted the business with Gordon, but was unknown to him. On the same day, and soon after the business with Gordon was completed, the bank closed its doors, ceased to do business, and passed into the

[9] The arguments of counsel and a part of the opinion of the court, on another point, are omitted.

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hands of a bank examiner. A few days afterwards Armstrong was appointed receiver. Warner, upon learning of the failure of the bank, stopped the payment of his check, which Gordon had deposited with it as before stated, and the check came to Armstrong's possession upon his appointment as receiver, in which capacity it is now held by him. Gordon, who was in fact the agent of Warner in the transaction referred to with the Fidelity Bank, became insolvent shortly after the failure of that bank, and made an assignment of his property in trust for the benefit of his creditors; and the trustee, having custody of the draft for $3,200, was made a party to the action below. One of the objects of the plaintiff's action was to have the liability of the bank to him on that draft, issued for his benefit, set off against his liability to the bank on the check for $4,067.82, which Gordon deposited with the bank, under the agreement already stated.

The additional facts peculiar to the other set-off claimed are, in substance, these:

On the 21st of February, 1887, Warner accepted a draft drawn on him by Gordon, for the latter's accommodation, for the sum of $4,249.26, payable to the order of Gordon, four months after date. This acceptance the Fidelity Bank discounted for Gordon, and carried the amount to the credit of his deposit account. On its maturity the acceptance was protested for non-payment, and Gordon's liability made absolute. The draft passed into the hands of Armstrong, upon his appointment as receiver, and is still held by him. At the time of the failure of the bank, and the appointment of the receiver, there was a balance due Gordon, on his deposit account, of $1,190.57, which the plaintiff seeks to have set off against the draft.

The trial court adjudged that the plaintiff was entitled to have the set-offs allowed, but required, as a condition to the entry of judgment, that he pay the balance remaining due on his obligations in the hands of the receiver, which, the record shows, was deposited with the clerk, and judgment was accordingly entered. The plaintiff in error resisted the set-offs, as stated by his counsel in their briefs:

"First—Upon the ground that, Warner's liabilities to the bank not being due at the date of its failure (June 21st), the legal or statutory right of offset did not exist; nor did the necessary conditions exist for their allowance as equitable set-offs.

"Second—That even if they were allowable as equitable set-offs, yet, being asserted against the assets of a national bank in the hands of a receiver, they could not be allowed without violating section 5242 of the Revised Statutes of the United States."

And it is upon these specific grounds that counsel contend the judgments below should be reversed. We will consider them in the order stated; and, while the set-offs allowed do not both stand upon precisely the same footing, they may, for convenience, be considered together.

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1. It is undoubtedly true that under the statute cross-demands are not "deemed compensated, so far as they equal each other," unless they have existed under such circumstances that, if the holder of one of the demands had brought an action upon it against the holder of the other, the latter could have set up his demand by way of set-off or counter-claim; and as a general rule, to entitle a set-off to be made at law, a present right of action must exist in favor of the holder of each demand against the other, at the same time; and consequently the assignment of one of the demands before it becomes due will in general defeat the set-off. This was held in Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312, where there were no equitable considerations for applying the principle of compensation to cross-demands. But, "if an insolvent holder of a claim not yet matured assigns the same before maturity, and the debtor at the time of the transfer holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected." Pomeroy on Remedies, § 163. This rule, it is said, is based upon considerations of equity, and is adopted to prevent one party from losing his own demand on account of the insolvency of his immediate debtor, and from being at the same time compelled to pay the debt originally owing by himself to the insolvent assignor. It can, of course, have no proper application when the thing transferred is commercial paper, and the assignee becomes the bona fide holder thereof for value.

The rule was approved and applied in the case of Bank v. Hemingray, 34 Ohio St. 381, where the balance due a co-partnership on its deposit account with a banking house which had become insolvent was set off against the individual notes executed by one of the co-partners to the bank, notwithstanding the notes had been transferred before their maturity to the assignee of the bank for the benefit of its creditors. Under this rule, the fact that Warner's liability to the Fidelity Bank had not matured when it failed, either on the check drawn by him on the Rochester Bank for $4,067.82, or on his acceptance of the Gordon draft for $4,249.26, did not, of itself, defeat his right to the set-offs which were awarded him by the judgment below, unless the position of the receiver, with respect to his rights against those indebted to the bank, is a more favorable one than that of an assignee in insolvency; and that it is not is well settled. The receiver is not a bona fide holder for value of the assets of the bank, in the sense that its commercial paper in his hands is protected against defenses which might have been set up against the bank. He succeeded only to the rights of the bank at the time of its failure; and a set-off available against the bank at that time is equally available against him. Hade v. McVay, 31 Ohio St. 231, and cases cited on page 238.

The remedy of set-off has been much enlarged in equity, and is there administered in cases where, under the strict rules at law, it

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would not be available. Thus, at law, a joint demand cannot be set off against a several one, nor a several demand against a joint one; but equity adopts a different rule where, on account of the insolvency of one of the parties, the other is in danger of losing his claim. Sarchet v. Sarchet, 2 Ohio, 320; Baker v. Kinsey, 41 Ohio St. 403. And, generally, equity will enforce the right of set-off, by decreeing the compensation of mutual demands, so far as they equal each other, where they have grown out of the same or connected transactions, or the one has formed, in whole or in part, the consideration of the other, and the party against whom the set-off is asserted is insolvent. These equitable grounds for the allowance of the set-offs claimed by the plaintiff are present in the case under consideration.. The fund against which the check on the Rochester Bank was drawn was the property of the plaintiff; and the check was put in the hands of Gordon to meet the maturing obligation of the plaintiff. In transferring the check to the Fidelity Bank, and obtaining from it the draft for $3,200 on the First National Bank of New York, Gordon was the agent of the plaintiff, and the transaction was for the latter's benefit. The check was deposited upon the agreement that the draft should be issued for the specified sum, and the deposit and draft were each the consideration for the other. It is not to be supposed that the transaction would have occurred, if the plaintiff or his agent had known, at the time, of the bank's insolvency. No funds were in the hands of the drawee at the time the draft was issued, nor was any provided with which to meet it on presentation; and therefore presentment and protest were not required in order to fix the liability of the drawer. The failure of the bank to provide the requisite fund to meet the draft made it necessary, for the plaintiff's protection, to stop the payment of the check; and thus the liability of the plaintiff to the bank on the check, which the receiver seeks to enforce against him, arose from the bank's breach of its obligation, incurred as the consideration, in part, of the deposit of the check. There is nothing lacking here that is essential to a complete equitable right of set-off.

And the same is true as to the other set-off allowed. The draft drawn by Gordon on Warner for $4,249.26 was accepted by the latter solely for the accommodation and benefit of the former. They are each liable thereon, it is true; but their relation to each other is that of principal and surety. If an action were brought by the bank against Gordon as the drawer of the draft, he would be entitled to set off against his liability the balance standing to his credit on his deposit account with the bank; and, he being insolvent, his surety has the right to have the set-off allowed against his liability, which is but a mode of compelling the application of the principal's property to the payment of his own debt, for the relief of his surety. The objection made to this set-off, on the ground that the liability on the draft had not matured when the bank failed, has already been disposed of; for,

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in that respect, it does not differ from the one previously considered. * * *

We find no error in the record, and the judgment is affirmed.[10]

[10] Similarly the surety, when sued alone in jurisdictions where equitable defenses are permitted, may avail himself of those equitable set-offs which arise out of the same transaction and to which the principal would be himself entitled. Bechervaise v. Lewis, L. R. 7 C. P. 372 (1872).

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CHAPTER VII

DUTY OF CREDITOR OR PROMISEE TO PURSUE PRINCIPAL BEFORE SUING SURETY OR GUARANTOR

MOUSSA v. LOTERIJMAN & CO.

(High Court of the South African Republic, 1894. 1 Reports of the High Court of the South African Republic, 326.)

This was an appeal from the Judicial Commissioner of Johannesburg. The respondents had sold goods to a certain Ibraim to an amount of £17. 19s. 9d., for payment of which amount the appellant had bound himself as surety. Ibraim failed to meet his obligation, and the respondents, ascertaining that he had gone abroad, sued the appellant as surety for payment of the amount. The appellant raised the defense that the respondents, plaintiffs in the first instance, should have excussed the principal debtor before seeking recourse against him as surety, and produced evidence to show that at the time summons was issued, and even afterwards, the principal debtor was traveling about in the state as a hawker. Judgment was given against the appellant, who now appealed.[1]

AMESHOFF, J., in giving the judgment of the court dismissing the appeal, said that it was unnecessary to decide the question as to the onus of proving absence from the country, inasmuch as the principal debtor could not be found by the creditor, and the latter might therefore rightly conclude that he was abroad.[2]

[1] The arguments of counsel are omitted.

[2] The principal case is under the civil law, as to which, on the subject of excussion, a valuable note will be found in Meig's Tennessee Reports, p. 173. In the law of England the beneficium excussionis does not exist. But the equity of exoneration entitles the surety by application to a court of equity to obtain in a modified form the beneficium excussionis. (See The Equity of Exoneration, Part II, Chapter I.) Such application to equity must, however, be made before the surety is sued at law; otherwise, it is too late. Hays v. Ward, 4 John. Ch. (N. Y.) 123, 8 Am. Dec. 554 (1819). And this equity cannot be then employed as a plea at law. Circumstances of a peculiar character (e. g., as in Hays v. Ward, supra, the usurious character of the security taken by the creditor) may justify a court of equity in granting an injunction against an action commenced at law until the creditor shall exhaust the questionable security—rendered so by his own illegal act.

In American jurisdictions the beneficium excussionis has made its appearance in the case of so-called guaranties of collection as contrasted with guaranties of payment (suretyships); the latter following the law of England and affording no beneficium excussionis, but the former requiring the creditor to first exhaust his remedy against the principal.

A so-called guaranty of collection or guaranty cannot be enforced in some jurisdictions in the United States against the guarantor without excussion of

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CHAPTER VIII

TRANSACTIONS OF CREDITOR OR PROMISEE WITH PRINCIPAL, GIVING RISE TO EQUITABLE RIGHTS OF SURETY SUBSEQUENTLY RECOGNIZED BY COURTS OF LAW

SECTION 1.—EXTENSION OF TIME TO PRINCIPAL

REES v. BERRINGTON.

(High Court of Chancery, 1795. 2 Ves. Jr. 540.)

Thomas, Daniel, and Richard Blachford carried on business as lacemen in partnership till the death of Thomas. On taking the accounts a balance of £2,972. 3s. 5d. appeared to be due from the partnership to Robert Pope Blachford, as administrator of Thomas, to secure which sum and £466. 13s. 4d., agreed to be secured to Robert Pope Blachford, as Thomas' share of the debts due to the partnership, a joint and several bond, dated September 31, 1787, was executed by the surviving partners, and by James Rees as surety, with condition to be void on payment of the said sums with interest by instalments upon the 31st of December, 1789, and the 31st of December, 1790. In the beginning of September, 1790, Robert Pope Blachford died. Upon the 27th of September, 1790, the whole of the money and interest secured by the bond remaining unpaid, James McKenzie, under the authority and on behalf of the executors of Robert Pope Blachford, came to an arrangement with Daniel and Richard Blachford concerning the money due on the bond and interest; and for the first instalment due on the bond took their promissory notes payable on the 21st of April, 21st of July, and 21st of October, 1791, and the 21st of January and the 21st of April, 1792; and for the second instalment to become due upon the bond, took three other promissory notes pay-

the principal or evidence that excussion would be useless. Dutton v. Pyle, 195 Pa. 8, 45 Atl. 429 (1900).

If the duty of excussion exists, it must be exercised within a reasonable time after default; and if excussion is unreasonably delayed, such delay, though followed by excussion, will discharge the guarantor of collection. Tiffany v. Willis, 30 Hun (N. Y.) 266 (1883), five years and six months. See cases in 20 Cyc. p. 1455, note 17.

On duty of excussion of principal and burden of proof where principal removes from state, see note, 10 H. L. R. 455.

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able on the 21st of July and 21st of October, 1792, and the 21st of January, 1793. Daniel and Richard Blachford at different times on and before the 18th of October, 1792, paid to the executors of Robert Pope Blachford, or to McKenzie on their behalf, the first three of the first set of notes, and the interest due upon them; and about the 20th of October, 1792, by a new arrangement all the remaining notes were exchanged for four other notes, dated October 22, 1792, and payable on the 25th of May, 25th of June, 25th of September, and 25th of December, 1793. About the 7th of December, 1792, a commission of bankruptcy issued against Daniel and Richard Blachford; and the executors of Robert Pope Blachford proved under that commission a debt of £2,327. 14s. 11d. by virtue of the bond and the four notes dated October 22, 1792. Rees was captain of an East India ship, and left England in April, 1788, returned in August, 1789, sailed again in April, 1791, and returned again in July, 1792. In August, 1792, he had in his hands the sum of £3,000. received by him in India for Daniel and Richard Blachford; and no communication having taken place between him and the executors of Robert Pope Blachford respecting their transactions with Daniel and Richard, he in November, 1792, paid over that sum to the Blachfords. After the bankruptcy the executors brought an action against Rees for £2,400. as remaining due on the bond, upon which he filed a bill for an injunction.[1]

Lord Chancellor [LOUGHBOROUGH]. Percival never could be a surety, whether that case is right or wrong. He should have taken up his bond, if he went out of the trade.

The form of the security forces these cases into equity; but take it out of that form, and suppose, in this instance, that the plaintiff was a surety by a proper bond at law as surety; what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety: but if he could establish that at law, the principle at law is that he has an interest in the condition; and if the period is extended, that totally defeats the condition; and the consequence is the surety is released from his engagement. Suppose a bond payable in six months, with a surety; he does not become bound to answer the engagement at twelve months, where it was to be at six. The principle is a legal principle. In this court they all appear principals; but establish the fact that he is surety, he is surety to a definite, not an indefinite, engagement. Here upon the second instalment the defendants have extended time before that instalment became due. If the time is extended after it becomes due, that makes a difference at law; for then the bond has been once forfeited. It is perfectly plain, from the nature of the engagement, that the plaintiff became security that the debt should be paid at two

[1] The arguments of counsel are omitted.

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periods. One has elapsed. The obligee thinks fit totally to change the nature of the security and the credit. He takes notes, gives a farther time of payment, and repeats the same thing as to the second instalment, which was not then due; and, doing this, he does this material injury to the surety: He has a right the day after the bond is due to come here and insist upon its being put in suit. The obligee has suspended that, till the time contained in the notes runs out. Therefore he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it.

The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person, with whom he is bound, requires. It is a breach of the obligation in conscience and honesty; and it is not too much to say of that obligation in point of law. I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built. But it is plain here, if the plaintiff had been informed of these transactions and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security. I do not ground much upon it; for the case would be the same if those circumstances had not come out clearly in evidence. This produces no inconvenience to any one; for it only amounts to this: That there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it. See Perfect v. Musgrave, 6 Pri. 111. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement.

The authorities fully warrant me in this; though I should have granted the injunction even without that strong authority before Lord Thurlow, which is rather less favorable for the surety. There the creditor, being called upon, did put the bond in suit. If he had proceeded, the consequence would have been only that he would have had the person in custody. It would have been no payment. Thinking that by leaving the debtor at large and taking a judgment against him, which affected all his property, he pursued a better mode, using his discretion and acting upon his own account, he thought it better to give stay of execution than to have confounded the affairs of the man by destroying his credit and holding him in prison; but he did it without consulting the surety, and therefore Lord Thurlow held, and very rightly, that the surety was discharged. The transaction in this case was much more mischievous. After circumstances of communication, that show-

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ed great embarrassment, great difficulty, and great distress, indulgence was from time to time given under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who in the interval had given up the fund, which probably was the inducement to him to be the security.[2]

BOULTBEE v. STUBBS.

(High Court of Chancery, 1811. 18 Ves. 19.)

Thomas Boultbee, being called upon by the defendant, who was his banker, for security, procured his brother, Charles Boultbee, as surety to join him in a bond for £10,000. with a stipulation that Charles, the surety, was only to be liable to the extent of £6,000., if upon the account that amount should be due. Upon a subsequent settlement of the account, the balance due to the banker appearing to be £9,500., Thomas Boultbee gave him a mortgage for £4,000. It was agreed between them that the residue should be paid by instalments; and a warrant of attorney was given to confess judgment for the balance, but expressly without prejudice to any security Stubbs now holds for the said sum, or any part thereof. The surety, being afterwards sued, filed the bill, and moved for an injunction.[3]

Lord Chancellor [ELDON]. The law of this case is perfectly clear. The circumstances upon the face of the bond are these:

The defendant, a banker, unwilling to give Thomas Boultbee credit to the amount he wished upon his own personal security, or upon the credit and security of the different bills and notes which he should pay into the bank in the course of his dealing, required a bond for £10,000. from him, and from his brother, as surety, under which the surety was to be liable only to the extent of £6,000., if upon the account that

[2] In Skip v. Huey, Wilcox & Edwards, 3 Atk. 91 (1744), Lord Hardwicke said: "What is the rule? He who trusts most shall lose most. If Skip had refused, Edwards might have arrested Huey upon the note which he had given Edwards by way of indemnity against the bond."

Accord: Nisbet v. Smith, 2 Bro. C. C. 579 (1789); Bolton v. Salmon, [1891] L. R. 2 Ch. 48; Wright v. Simpson, 6 Ves. Jr. 715 (1802).

See "Specialty Contracts and Equitable Defenses," by Professor Ames in 9 H. L. R. p. 56.

See note to Ewin v. Lancaster, 6 B. & S. 571 (1865), in 2 Ames' Cases on Bills & Notes, 83.

Similarly the extension before maturity of a debt due by bond, where the creditor accepts the note of the principal and others to mature after maturity of the bond. Brown v. Mason, 55 App. Div. 395, 66 N. Y. Supp. 917 (1900), affirmed in 170 N. Y. 584, 63 N. E. 1115 (1902).

But the acceptance of a note to which the surety's name is forged as joint maker in renewal of the original note is not a binding extension. Lovinger v. First Nat. Bank, etc., 81 Ind. 354 (1882).

[3] The arguments of counsel are omitted.

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amount should be due. On the settlement of accounts a balance of £9,500. appearing to be due, it is clear that, if Thomas Boultbee, the principal debtor, had given a mortgage for £3,500., that security might have been given and taken, without prejudice to the bond; but a mortgage was given for £4,000., reducing the debt therefore below £6,000., and as to the residue of the debt it was provided that it should be paid by certain instalments, fixed by the instrument.

The consequence of this transaction in equity is that, the surety continuing liable for the sum of £5,500., remaining due upon the settlement of accounts, and the creditor agreeing with the principal debtor to postpone his remedy, changing his immediate right to sue to a right to call for certain instalments, the effect of that agreement is that in equity the right against the surety is gone. It is in vain to say the indulgence to the principal by taking the mortgage, and giving time, may be for the benefit of the surety. It is in most cases for the advantage of the surety; but the law takes so little notice of that circumstance that, if the acceptor of a bill becomes bankrupt, the holder must give notice to the drawer, as another person has no right to judge what are his remedies, and the original implied contract being that, as far as the nature of the original security will admit, the surety, paying the debt, shall stand in the place of the creditor.

The cases that have been alluded to, and there is a great variety of them, are those of a creditor entering into a composition with the person liable in the first instance, with a stipulation that it shall not prejudice his remedies against others, who are liable as sureties. The ordinary case is that of compositions upon bills. The answer given is that by the agreement, reserving the creditor's remedy against sureties, the situation of the surety is not varied; and this doctrine has been held at law as well as here. But I agree that a stipulation of that kind is in many cases so very absurd that it must be seen plainly; and the true question is whether these words in the warrant of attorney, "without prejudice to any security," mean that this bond was to be saved against the surety, the demand upon which was intended to be arranged by that very transaction, or whether the meaning of those words is not that, the principal debtor being in the habit of giving securities to the creditor from time to time, this transaction should liquidate the matter of the bond, but should not prejudice the banker's right as to other securities in his hands. If that is the meaning of this transaction, it puts an end to the right against the surety. If, on the other hand, the object was to give as extensive a remedy as was given in Mr. Burke's Case [cited by the Lord Chancellor, ante, 6 Ves. 809, Ex parte Gifford], then that case and many others must govern this.

My opinion is that it was not intended to save this bond among other securities, the saving of which securities will give a reasonable interpretation to these words in the warrant of attorney.

1811, January 23. The motion to dissolve the injunction was renewed.

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Lord Chancellor [ELDON]. This question is now presented to me in quite a new point of view. Upon the former occasion it was argued as if the immediate right of action against Thomas Boultbee, the principal debtor, was gone. It is clear that, if he might have been forthwith sued, and execution had against him as the fruit of that suit, the surety is not injured; and, on the other hand, that in general, if time is given to the principal, the surety is discharged. The objection to the reserve of remedy against the surety consists in the interest the principal has that the surety shall not be applied to. It is said that the principal cannot by contract deprive himself of the benefit derived from that forbearance; and there certainly have been decisions that, if time is given to the principal, reserving the right to go against the surety, the principal cannot raise the objection upon his right to time as against the surety, as there is the contract of the principal, arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal. That was Burke's Case, as to which I will look at the note I have. If the contract for reserve against the surety prevents his remedy against the principal, that contract for reserve will not do; but the question is whether it does in law deprive the surety of that benefit. It may in many cases be a very rational provision that the principal shall have time, provided he can have it without prejudice to the benefit of the remedy against the security, which, though worth nothing at present, may in a year's time be very valuable; and the creditor may very reasonably mean to secure the benefit of that contingency.

1811, April 11. The Lord Chancellor granted the injunction.[4]

[4] The giving of a definite extension of time, "that is, if time is given by virtue of positive contract between the creditor and the principal, not where the creditor is merely inactive," discharges the surety, "and * * * for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract." Per Lord Eldon, in Samuell v. Howarth, 3 Mer. 272 (1817), Ames' Cas. 153.

The reason for the rule is thus further shown by Lord Eldon to depend directly upon the doctrine of the equity of exoneration: "And with respect to principal and surety in a bond, where the creditor enters into an agreement or binding contract with the principal debtor to give him further time without the concurrence of the surety, the surety is discharged, as the creditor by his new contract destroys the benefit which the surety had under the former contract, as he puts it out of his own power to make good his engagement to enforce immediate payment from the principal, when the surety would have a right to require him to do so." Lord Eldon, in Governor and Company of the Bank of Ireland et al. v. Beresford et al., 6 Dow, 238 (1818).

In Forbes v. Sheppard, 98 N. C. 111, 3 S. E. 817 (1887), is an instance where the creditor violated the binding agreement to extend the time and sued on the very day the obligation matured. It was held that the surety was nevertheless discharged.

The doctrine of the principal case is equally applicable to cases of suretyship arising after the incurring of the original debt. A guarantor, who was

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McLEMORE, Plaintiff in Error, v. POWELL et al., Defendants in Error.

(Supreme Court of the United States, 1827. 12 Wheat. 554, 6 L. Ed. 726.)

Mr. Justice STORY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of West Tennessee.

The original action was assumpsit, brought by Powell, Fosters & Co., as holders of a bill of exchange drawn by one Thomas Fletcher, in May, 1819, at Nashville, upon Messrs. McNeil, Fisk & Rutherford, at New Orleans, payable to Thomas Read, or order, for two thousand dollars, in sixty days after date, and by him indorsed to the defendant, John C. McLemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, McLemore, examined as a witness, and, among other things, testified that, in the month of October following the dishonor of the bill, "one of the plaintiffs applied to him at Nashville for the money on the bill, and threatened to sue immediately if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville about the expiration of that time, and would receive said payment. Since said time the witness has never seen said plaintiff." The witness farther testified that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him that the bill would be left with a Mr. Washington at Nashville; that he expected he would himself be at that place at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do if the witness did not pay at the expiration of the time agreed on. It did not appear that any consider-

bound in consideration of forbearance to the principal (no time being named), was held discharged by an agreement between principal and creditor for two months' extension in consideration of the receipt of a horse. Deming v. Norton, Kirby (Conn.) 397 (1788).

The surety may, of course, agree at the time of entering into the agreement, or subsequently, that the payment may be extended until he gives notice to the contrary. But such an agreement implies that all parties to the paper as to whom he might have recourse as co-sureties or principals shall execute the extension paper. Hence, though an indorser for accommodation signs such an agreement, he will be discharged if a co-maker of the note be discharged by a binding extension. Uniontown Bank v. Mackey, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485 (1891).

Where, in point of fact, no extra time could have been gained by the debtor under the agreement, the surety is not discharged. Price v. Edmunds, 10 B. & C. 578 (1830).

On extension of time of payment indefinitely as a discharge of surety, see note, 10 H. L. R. 455.

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ation was paid or stipulated for this delay; and no suit was commenced until after this period had elapsed. The District Judge instructed the jury that if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was given or paid, or to be paid by Fletcher, the indorsers were not discharged; that an agreement for giving day must be an obligatory contract for a consideration which ties up the hands of a creditor, and disables him from suing, thereby affecting the interests and rights of the indorsers; that the indorser has a right to require and demand of the creditor to bring suit against the drawer, and, if he has disabled himself from bringing a suit by a contract for a consideration, he has thereby released the indorser; and that, if the jury were satisfied, from the testimony, that time was given for a valuable consideration paid, or to be paid, or that a new security was taken by the holder, that the indorser was discharged and absolved from all the obligations of the indorsement.

Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its legal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to reinstate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence by suit against the principal. Without expressing any opinion on this point, it is sufficient to say that the error, if any, was favorable to the defendant, and, therefore, it can form no subject of complaint on his part.

The case then resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee and due notice to himself. And we are all of the opinion that it does not. We admit the doctrine that although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have

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found that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord Eldon, in English v. Darley, 2 Bos. & Pull. 61, that "as long as the holder is passive, all his remedies remain"; and, we add, that he is not bound to active diligence. But, if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present question. In Walwyn v. St. Quintin, 1 Bos. & Pull. 652, where the action was by indorsees against the drawer of a bill, it appeared that after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account from the indorser; and to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. The court held it no discharge, and Lord Chief Justice Eyre, in delivering the opinion of the court, said that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear the drawer would have been discharged, for it would be giving a new credit to the acceptor; but that, after protest for non-payment and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him.

The same doctrine was held in Arundel Bank v. Goble, reported in a note to Chitty on Bills. Chitty (Ed. 1821) 379, note "c." There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant, and that the understanding that interest should be paid by the acceptor made no difference. So, in Badnall v. Samuel, 3 Price's Exch. Rep. 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor at any time.

Upon authority, therefore, we are of opinion that this writ of error cannot be sustained, and that the judgment below was right. Upon

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principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice is founded upon the notion that the stipulation for delay suspends the present rights and remedies of the holder.

The judgment of the court below is therefore affirmed, with costs.[5]

KELLOGG v. OLMSTED et al.

(Court of Appeals of New York, 1862. 25 N. Y. 189.)

Appeal from the Supreme Court. Action on a note for $600, made by the defendants and one John I. McPherson, since deceased, dated October 1, 1855, payable one year after date, with interest semi-annually, to one George R. D. Covil or bearer.

The answer admitted the making and delivery of the note to Covil and the transfer of it to the plaintiff, but set up as a defense that on the 8th day of October, 1856, and after the note became due, and while Covil was the holder of the note, it was mutually agreed, between Covil and the defendants, "that in consideration that the defendants would keep the principal sum of the said note until the 1st day of April, 1857, and pay the same with interest on that day, he, the said Covil, would extend the time of payment of the principal of said note until the 1st day of April, 1857; that the said defendants then and there assented to said proposition, and then and there agreed to and with said Covil, to keep said principal sum of said note until the 1st day of April, 1857, and to pay the same with interest on that day"; and that the note was transferred to the plaintiff by Covil, after the agreement so made by him with the defendants, and the plaintiff took the note with full knowledge thereof.

On the trial of the action before a referee, the defendants offered to prove the defense so specially set up; but the referee ruled out the evidence, upon the ground that the agreement or matters thus specially set up as a defense, if proved, would be no defense. To this ruling the defendants excepted. The appeal to this court was from the judgment of the Supreme Court in the Eighth District, affirming the judgment entered on the report of the referee.

SUTHERLAND, J. I cannot avoid thinking that this case presents an ingenious attempt on the part of the appellants to avoid the application

[5] An almost infinite number of authorities are in accord with the principal case.

See, in accord, Townsend v. Riddle, 2 N. H. 448 (1822), post, p. 545.

In Trent Navigation Co. v. Harley, 10 East, 33 (1808), Lord Ellenborough said: "The only question is: Whether the laches of the obligees in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity."

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of the well-settled principle that an agreement by a creditor to postpone the payment of a debt due until a future day certain, in consideration of no other or further consideration than the agreement of the debtor to pay the debt with interest on that day, is void for want of consideration.

It has been decided over and over again, if the creditor whose debt is due receives part payment of it, and in consideration of such payment promises to postpone or extend the time of payment of the balance, that such promise is void for want of consideration. Miller v. Holbrook, 1 Wend. 317; Gibson v. Renne, 19 Wend. 390; Pabodie v. King, 12 Johns. 426; Reynolds v. Ward, 5 Wend. 501; Fulton v. Matthews & Wedge, 15 Johns. 433, 8 Am. Dec. 261.

These cases certainly assume that a promise by a creditor, no part of whose debt is paid, to extend the time of payment of the whole debt to a future day certain, in consideration of the promise of the debtor to pay the debt with interest on that day, would be void.

A creditor, promising to extend the time of payment until a certain day, would not expect or ask his debtor to make a formal express promise, in consideration of such extension, to pay his debt on that day, and not before that day, nor would the debtor, relying on such promise of extension, be very apt to make any such formal express promise; but if the promise of extension on the part of the creditor were held valid, such a promise on the part of the debtor would necessarily be implied. It would be implied from his acceptance of and reliance on the promise of the creditor. No court would ever hold the promise on the part of the creditor valid and binding without holding that there was a corresponding obligation on the part of the debtor to pay at the time fixed by the promise of extension, and not to pay before; that is, in the language of the defendant's answer, to keep the money until the day fixed by the promise of extension. Hence the cases before cited necessarily assume that the agreement, or mutual agreements, specially set up in the defendant's answer would be nudum pactum and void, and would not have been a defense if proved; for these cases must have been decided on the assumption, if the promise on the part of the creditor to extend the time of payment was valid, or should be held valid, that there was or would be a corresponding valid obligation or promise on the part of the debtor, not only to pay at the time fixed by the agreement of extension, but also not to pay before. These cases, then, in effect decide, if a creditor whose debt is due, in consideration of the payment of a part of it, and of a promise on the part of his debtor to pay the balance on a certain future day, and not before, promises to extend the time of payment of such balance until that day, that such promise is without consideration and void.

In this case the defendants paid no part of the debt. The sole alleged consideration of the plaintiff's promise to extend the time of payment of the whole debt until the 1st of April, 1857, was a promise, on the part of the defendants, to pay the debt with interest on that day,

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and not before that day. The promise on the part of the defendants is not stated in the answer in these precise words, but is substantially this.

But upon principle, and without reference to cases, the counsel for the appellants concedes that their promise to pay interest was no consideration for Covil to delay payment, because, if Covil had delayed payment without such promise, he would have been entitled to such interest; but he insists that their promise not to pay the principal until the 1st of April, and then to pay it, was a sufficient consideration for the promise of delay on the part of Covil, because it deprived them of the right to pay the money at any time, and secured to Covil the right to compel the defendants to keep the money until the 1st of April. This, I think, is fanciful. The appellants were to pay only legal interest for the use of the money. The rate of interest, or value of the use of money, being fixed by law, the law cannot hold the delay of payment to be either a disadvantage to the debtor or an advantage to the creditor; the one paying, and the other receiving, the legal rate of interest for the use of the money only. The law cannot hold it to be a disadvantage to a man to agree to keep the money of another for a time certain, for the use of which he is only to pay the rate of interest fixed by the law.

My conclusion is that the judgment of the Supreme Court should be affirmed, with costs.

WRIGHT, GOULD, ALLEN, and SMITH, JJ., concurred.[6]

Judgment affirmed.[7]

WAKEFIELD BANK v. TRUESDELL.

(Supreme Court of New York, 1864. 55 Barb. 602.)

Appeal by the plaintiff from a judgment entered upon the report of a referee.

On the 23d of February, 1855, the Beaver Manufacturing Company, by its treasurer, made its promissory note for $2,500 (without interest), to the order of John Thompson, payable at the Wakefield Bank, at six months after date. The note was indorsed by the payee. The payment was jointly and severally guaranteed by the defendant and several others, and on the 28th day of February the note was discounted by the plaintiff, for the accommodation of the maker, and the proceeds placed to the credit of Thompson, who was an agent of the company.

[6] The dissenting opinion of Davies, J., has been omitted. Denio, C. J., also dissented.

[7] Accord: Campbell v. Daly, 25 Leg. Int. 124 (1868), Supreme Court of Pennsylvania; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946 (1906); Wilson v. Powers, 130 Mass. 127 (1881).

See cases contra under note to Dodgson v. Henderson, post, p. 464.

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On the 24th of August, 1855, John Thompson paid to the cashier of the plaintiff, with the funds of the maker, the interest on the note up to the 26th day of February, 1856, which payment was made without the knowledge or assent of the defendant. The payment was made and received specifically for interest, and the cashier indorsed upon the note the words, "Int. paid to Feby. 26th, 1856;" but no express agreement was made to wait for the payment of the principal till that time, or any agreement other than what is to be implied from the transaction as above stated.

The referee found, on this point, that the plaintiff, without the knowledge or assent of the defendant, did extend the time of payment upon the note for six months, and gave the maker time for its payment until the 26th day of February, 1856, and that the defendant was thereby discharged from his liability as surety, and ordered judgment for the defendant.

FOSTER, J. In the view I take of this case, it is unnecessary to present an analysis of the authorities cited by the counsel, as to which there is some real and more seeming conflict. Those cited by the counsel for the plaintiff hold, in cases somewhat analogous to this, that the payment of interest did not extend the time of payment of the note. Freeman's Bank v. Rollins, 13 Me. 207; Crosby v. Wyatt, 23 Me. 162; Oxford Bank v. Lewis, 8 Pick. (Mass.) 458; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; Agricultural Bank v. Bishop, 6 Gray (Mass.) 317; Lime Rock Bank v. Mallett, 34 Me. 547, 56 Am. Dec. 673; 4 Hurlston & Norman, 861. While those cited by the counsel for the defendant hold that the receipt of interest in advance upon a note from the maker for a definite period, if the right to sue is not expressly reserved, suspends the right of action for that time, and discharges the surety. Crosby v. Wyatt, 10 N. H. 318; New Hampshire Savings Bank v. Ela, 11 N. H. 335; Robertson v. Stark, 15 N. H. 110; Kenningham v. Bedford, 1 B. Mon. (Ky.) 325; 1 Young & Collyer, 420–423; Burge on Suretyship, 206.

The real question is, what was the intention of Thompson when he paid the interest, on the 24th of August, in behalf of the makers? and what was the intent of the cashier when he received the interest, and indorsed it on the note? and how did they understand the intentions of each other?

The cashier and Thompson both testify that there was no express agreement to wait; but can any one doubt that Thompson, when he applied to the cashier to pay the interest, desired to have the time of payment extended for six months? or that the cashier understood that to be his object? or that Thompson would not have paid the interest for six months, except upon the understanding that the plaintiff was to wait for that time for the payment of the principal? I am clearly of the opinion that such was his desire, and that the cashier must have so understood him. If so, he was called upon to speak, if he did not mean to assent to the known desire of Thompson. He should have

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declined to receive the interest at all, or have informed Thompson that he should reserve the right to collect the note at any time. He, however, took the money and indorsed it as interest on the note; not as principal, nor generally, but as interest up to the 26th of February, 1856. And is it not clear that he intended to wait till that time for the principal, that he meant to have Thompson understand that he would so wait, and that Thompson did so understand him? It seems to me there can be no doubt that they so understood each other; and, if so, it has all the binding force of an express agreement to wait. Neither of them would, upon any other supposition, have acted as they did. And the bank and makers permitted the note to run during the six months, without payment, or attempt to collect it.

But it is claimed that the cashier had no authority to receive the interest and to contract to extend the time of payment. I do not consider the question entitled to a discussion. The cashier is the financial officer of the bank, and his agreements in behalf of his principal, in all matters relating to its business of discounting and banking, are binding upon it, to the same extent as if made by a resolution of the board of directors.

The judgment should be affirmed.[8]

BILLINGTON v. WAGONER et al.

(Court of Appeals of New York, 1865. 33 N. Y. 31.)

DAVIES, J. This action is brought to recover the amount of a promissory note, made by the defendants, payable to the plaintiff or bearer; the defendant James Wagoner being the principal in the note, and the other defendants his sureties. It appeared upon the trial that after the note became due, about December 1, 1857, it was agreed between the plaintiff and James Wagoner, the principal, in consideration that he, Wagoner, would deliver to the plaintiff a certain fat hog of the value of $11.25, and would release the plaintiff from the payment of two bushels of potatoes, theretofore sold and delivered by the defendant to him, the value of which is not stated, that the plaintiff would wait for and postpone the payment of said note until the fall of the year 1858. This action was commenced in April, 1858. The counsel for the plaintiff asked the court to charge the jury that if they should find that the agreement set forth in the answer had been proved, and that such an agreement had in fact been made between the parties, yet such an agreement would be usurious and void, and did not constitute a valid defense to the action, but that the plaintiff would, notwithstanding, be entitled to a verdict for the amount due on the note set forth

[8] Accord: Siebeneck v. Anchor Savings Bank, 111 Pa. 187, 2 Atl. 485 (1886). Contra: Semble, Davis v. Graham, 29 Iowa, 514 (1870); Haydenville Bank v. Parsons, 138 Mass. 53 (1884), post, p. 463, and note.

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in the complaint. The judge declined so to charge the jury, and the counsel for the plaintiff then and there excepted.

The judge charged the jury that, if they believed that the agreement set up in the answer had been proven, it would be a valid defense, and the defendants would be entitled to a verdict, to which the counsel for the plaintiff then and there excepted. The jury found a verdict for the defendants, and the court directed the exceptions to be heard in the first instance at the General Term, which, on such hearing, rendered a judgment for the defendants, and the plaintiff now appeals to this court.

It is incontrovertibly settled by abundant authority that the giving of time to the principal, without the consent of the surety, discharges and releases the latter. Gahn v. Niemcewicz, 11 Wend. 312; Chester v. Kingston Bank, 16 N. Y. 336; Smith v. Townsend, 25 N. Y. 479.

The doctrine on this subject is clearly laid down in Rees v. Berrington, 2 Ves. Jr. 540, by the Lord Chancellor, and that case has frequently received the approval of the courts of this state. He said: "There shall be no transaction with the principal debtor, without acquainting the person who has a part interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." In Ludlow v. Simond, 2 Caines, Cas. 57, 2 Am. Dec. 291, Kent, C. J., said: "It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract, and the creditor has no right to increase his risk without his consent, and cannot therefore vary the original contract, for that might vary the risk."

In Hubbly v. Brown, 16 Johns. 70, the Supreme Court held the indorser of the note discharged, when the holder, in consideration of a premium paid to him by the maker, after the note became due, agreed to wait ninety days longer, without suing upon the note. The indorsers were regarded as sureties for the maker, and therefore entitled to all the rights of sureties. This case is quoted approvingly in Reynolds v. Ward, 5 Wend. 501, where it was held that an agreement without consideration by a creditor with the principal debtor, enlarging the time of payment, does not discharge the surety to such note. But the doctrine of Hubbly v. Brown is fully conceded, and the whole ground of the decision is that the agreement was without consideration, and therefore the holder of the note was not estopped by it from proceeding forthwith, or at any time, to prosecute upon it. The reason given for the rule that the delay discharges the surety is that by virtue of the agreement, assuming it to be valid and binding, the holder is precluded, during the extended time, from proceeding against the

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maker or principal debtor. It is the right of the surety to discharge himself at any time by payment to the holder or creditor, and be subrogated to his right to enforce immediate payment against the primary or original debtor. This right would be utterly defeated if the creditor could give time to the principal debtor without the consent of the surety.

I do not understand this doctrine is controverted on the part of the plaintiff, but conceded by the position taken, that the agreement made by him with the principal debtor was void, and therefore the case is brought within the principle of that laid down in Reynolds v. Ward, supra. The agreement is claimed by him to be void on the ground that it was usurious, and that can only be affirmed on the assumption that it violated the statute against usury.

But, assuming that the agreement, made by the plaintiff with the principal debtor, was usurious, and therefore, in the language of the statute, void; can the plaintiff interpose that objection? The defendants claim it to be a valid and binding agreement. They are estopped from ever hereafter setting up that it was void; and, assuming it to be valid, the consequences resulting therefrom are the discharge of the sureties and the postponement of the plaintiff's right of action against the principal debtor, until the expiration of the postponed time of payment. Although the statute uses the language that any usurious note, contract, etc., shall be void, yet it is not always so regarded, as it is in the power of the party who can avail himself of that defense to waive it. He may waive the usury and provide for the payment of the money actually lent, with the legal interest thereon, and such liability furnishes a good consideration for a direction to assignees to pay that money out of an assigned estate, and those who come in as cestui que trust cannot object to the legality of the assignment and the validity of the trust therein contained. Pratt v. Adams, 7 Paige, 639.

But this defense or objection to the contract, that it is void on account of usury, can only be alleged or set up by the party bound by the original contract to pay the sum borrowed, or his sureties, heirs, devisees, or personal representatives. Post v. Bank of Utica, 7 Hill, 391; Mechanics' Bank v. Edwards, 1 Barb. 271. And I entirely concur in the views expressed by Barlow, Senator, in Post v. Bank of Utica, supra, when he says: "I concede that remedial statutes are to be construed liberally; but I cannot concede that a statute is remedial, which creates not only a forfeiture of the money lent, but renders the party violating its provisions guilty of a misdemeanor, and punishable by fine and imprisonment. On the contrary, it appears to me that such a statute is penal in its character, and subject to a strict construction." It is certainly a novel position that the usurer can come into court and claim that he had violated the statute, and that he should be subjected to its pains and penalties. Principle and authority alike condemn such a procedure. The precise point under consideration arose in La Farge v. Herter, 4 Barb. 346, when the court, by Gridley, J., says: "It does

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not lie in the mouth of La Farge to set up his own illegal conduct, and to allege that his own bond and mortgage are void for usury, and elect to treat them void for that reason. It is the victim of the usury, and not the usurer himself, that can set up against a contract that it is usurious and void."

This case came before this court in 9 N. Y. 241, and the judgment of the Supreme Court was affirmed. On this point the court, by Ruggles, C. J., said: "The taking of usury is a misdemeanor by statute, and the agreement to take it is, in the eye and in the language of the law, corrupt. The parties, however, do not stand in pari delicto. It is oppression on the one side and submission on the other. The borrower, therefore, may set up usury for the purpose of avoiding a contract tainted with it; but the lender cannot." And this precise question arose and was decided in a case in South Carolina, and which is approved of in La Farge v. Herter. It is the case of Miller v. Kerr, 1 Bailey, 4. It was an action of debt on bond. The defense was that the defendant had conveyed certain lands to the plaintiff in satisfaction of the bond debt. The plaintiff's answer to the defense was that the lands were conveyed in pursuance of a corrupt and usurious agreement, by which the lands were to be reconveyed to the defendant on payment by him of the bond debt, with 14 instead of 7 per cent. interest thereon, within two years; that the conveyance of the lands, being made on an usurious contract, was void, and the bond therefore unsatisfied. Johnson, J., in delivering the opinion of the court, said: "It is a clear and well-established rule of law that no one can take advantage of his own wrong. He who violates a law comes with a bad grace to ask to be restored to rights which he has surrendered by his illegal act; and for this reason he who pays money on an illegal consideration cannot maintain an action to recover it back. And what is the case here? The defendant was indebted to the plaintiff by bond. The plaintiff accepted lands in payment, and he now asks to be released from his last contract, and to be restored to his rights on the bond, upon the ground that knowingly and wilfully, and in violation of the statute against usury, he has annulled the debt due on the bond. According to the rule, he cannot be permitted to do so." This court said that this case appears to have been decided upon a sound principle, and it could not be distinguished from that of La Farge v. Herter, then under consideration, and that all the proofs offered in the latter case to show the bond and mortgage void for usury were rightfully excluded by the judge at the circuit.

It is seldom that a case so directly in point with that now under consideration is met with as that of Miller v. Kerr, supra. There, as here, the plaintiff asks the court to release him from his agreement, the last contract made by him with the principal debtor, upon the ground that he knowingly and wilfully, in violation of the statute against usury, made the agreement to give the principal debtor time

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for the payment of his debts. He asks the court to convict him of a crime, that he may maintain his action against the principal debtor before the time has expired which he gave him by this agreement for the payment of the debt, and that he may retain the liability of the sureties, notwithstanding such extension without their assent, on the ground that the agreement was a criminal act, illegal and void. In my opinion, the aid of the court cannot be invoked for such a purpose. Neither has the distinction alluded to by Ruggles, C. J., in La Farge v. Herter, any just application to the facts of this case, namely, that although a party to a fraud is estopped from setting up, for his own advantage, the fraud, yet, if his opponent alleges and proves it, as a part of his own case, the guilty party will then be entitled to the benefit, while he incurs the disadvantage resulting from such a state of things, citing Broom's Legal Maxims, 322.

In this case the defendants neither set up nor proved any usurious agreement. That contained in their answer, for aught that appears thereby, was a valid and lawful agreement, and it is the plaintiff who comes in with facts to show that it was usurious and void. If the defendants had set forth facts in their answer, and claimed that the agreement was void for usury, then the principle involved might have been relevant. Upon the facts of this case it is not.

If the case of Vilas v. Jones, 1 N. Y. 274, can be held as laying down a different doctrine, it must be regarded as overruled by the subsequent case of La Farge v. Herter, 9 N. Y. 241, supra. But I do not understand that any such point was decided in Vilas v. Jones. The doctrine is stated as being the opinions of Bronson, J., and Jewett, C. J., that an agreement made by a creditor with the principal debtor, to forbear the payment of the debt in consideration of an usurious premium paid for such forbearance, is void, and therefore cannot operate to discharge the action. Two authorities only are referred to by Judge Bronson, one of which (Tudor v. Goodloe, 1 B. Mon. 322) held that an agreement by the creditor to extend the time for payment on a promise to pay an usurious rate of interest for the forbearance did not discharge the surety, for the reason that, as the promise of the debtor to pay the usury was void, there was no consideration for the promise of the creditor to forbear, and consequently no binding contract on his part for time. The other case, that of Kenningham v. Bedford, Id. 325, was a later case, and identical in principle with that now under consideration. There, as here, the usury was paid at the time the creditor promised to forbear, and the court held that the surety was discharged; that, although the contract was void as to the debtor, it was valid as to the creditor, and, if he should sue before the expiration of the stipulated forbearance, the other party might have an action for damages. This decision is in harmony with the principles of La Farge v. Herter and the other cases in our courts already adverted to.

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I am satisfied that it expresses correctly the law, and it follows that the judgment appealed from should be affirmed, with costs.

BROWN, PORTER, and POTTER, JJ., and DENIO, C. J., concurred in this opinion.[9]

LAXTON v. PEAT.

(At Nisi Prius, in King's Bench, 1809. 2 Camp. 185.)

Action by the indorsee against the acceptor of a bill of exchange.

The bill was drawn by one Hunt, and accepted for his accommodation by the defendant. The plaintiff gave value for it, but had notice of the circumstances of its original formation. When it became due, he received part payment from Hunt, and gave him time to pay the remainder, without the concurrence of the defendant.

N. G. Clarke, for the plaintiff, contended that the defendant was still liable for such part of the sum mentioned in the bill as remained unpaid. Although the drawer might be discharged by the holder's giving time to the acceptor, it had been decided that nothing would discharge the acceptor but satisfaction of the bill, or an absolute renunciation of all claim upon him in respect of it.

Lord ELLENBOROUGH. This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer; and in the case of simple contracts the surety is discharged by time being given, without his concurrence, to the principal. The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant, and accepted by Hunt in consideration of a debt due. According to many authorities, the defendant, upon that supposition, would have been discharged by the time given to Hunt; and the principle of these authorities applies with equal strength to the facts actually given in evidence.

Plaintiff non-suited.[10]

[9] The dissenting opinion of Davis, J., has been omitted.

[10] In Kerrison v. Cooke, 3 Camp. 362 (1813), Gibbs, J., lamentingly said: "I am sorry the term 'accommodation bill' ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract by putting their names to negotiable securities."

Accord: Hall v. Capital Bank of Macon, 71 Ga. 715 (1883), post. p. 459.

Contra: Walker v. Bank, 12 Serg. & R. (Pa.) 382 (1825); White v. Hopkins, 3 Watts & S. (Pa.) 99, 37 Am. Dec. 542 (1841).

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SMITH v. SHELDEN et al.

(Supreme Court of Michigan, 1876. 35 Mich. 42, 24 Am. Rep. 529.)

Error to Wayne Circuit.

COOLEY, C. J.[11] The legal questions in this case arise upon the following facts:

Prior to June, 1867, Eldad Smith, Isaac Place, and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969 on book account.

In the month mentioned the firm was dissolved by mutual consent; Place purchasing the assets of his co-partners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the 2d day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with 10 per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness, and judgment recovered.

The position taken by the plaintiffs below was that, as they had never received payment of their bill for merchandise, they were entitled to recover it of those who made the debt; the giving of the note, which still remained unpaid, being immaterial. On behalf of Smith it was contended that, by the arrangement between Place and his co-partners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. And it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:

(1) Was the note given by Place in the co-partnership name for the co-partnership indebtedness, but given after the dissolution, binding upon Smith and Owen?[12]

[11] The arguments of counsel are omitted.

[12] The discussion of this question has been omitted from the opinion, which holds that the note given after dissolution was not binding.

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(2) If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And

(3) Did the taking of the note given by Place discharge Smith and Owen from their former liability? * * *

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by the arrangement, had agreed to pay this debt, and as between himself and Smith and Owen he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so, and made collections from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that, in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the co-partnership, seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely have attempted no change in the law, but are entirely in harmony with older authorities, which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We

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do not regard them as working any innovation whatever. The cases we particularly refer to are Oakeley v. Pasheller, 4 Cl. & Fin. 207, Wilson v. Lloyd, L. R. 16 Eq. Cas. 60, and Millerd v. Thorn, 56 N. Y. 402.

And it follows as a necessary result, from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and, as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as was remarked by the Vice Chancellor in Wilson v. Lloyd, L. R. 16 Eq. Cas. 60, 71: "The length of time makes no kind of difference." The time was the same in Fellows v. Prentiss, 3 Denio, 512, 45 Am. Dec. 484, where the surety was also held discharged. And see Okie v. Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251. But that indulgence beyond the time fixed was contemplated when the note was given is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial; but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction, and in most cases it works substantial justice.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.[13]

DEVERS v. ROSS.

(Supreme Court of Appeals of Virginia, 1853. 10 Grat. 252, 60 Am. Dec. 331.)

This was a supersedeas to a judgment of the Circuit Court of Harrison County. The case is sufficiently stated in the opinion.

SAMUELS, J. This was an action of debt, brought on a single bill in the name of Cyrus Ross, the obligee, for the use of Jesse Flowers,

[13] Accord: Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90 (1876). Similarly the mortgagor is discharged if, after he conveys the equity of redemption to a grantee (who assumes the debt), the mortgagee, knowing of the arrangement, gives the grantee (now the principal) a binding extension of time. Union Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118 (1892), enforcing law of Illinois. See cases in the note to Overend v. Oriental Co., post, p. 459.

Contra: Maingay v. Lewis, 3 Irish Reports (Common Law Series) 495 (1869); Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464 (1876); Shapleigh Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783 (1896). But see Zapalac v. Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938 (1900).

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against James P. Wilson, a principal debtor, and James Devers, his surety. A joint plea of payment was filed by the defendants, and issue made up thereon. A separate plea was filed by Devers, the surety, alleging, in substance, that this party executed the single bill as surety; that it had been assigned and delivered by the obligee, Ross, to one William Martin; that Martin, for the use of Jesse Flowers, had instituted an action thereon against the obligors; that during the pendency of this action, an agreement under seal was made between Martin and Wilson, the principal debtor, whereby Wilson agreed to pay all costs that had accrued upon the suit; and that Martin, without the knowledge, privity or consent of Devers, the surety, agreed to forbear and give day of payment of said debt until a day certain; that the costs were paid and the suit dismissed, and the forbearance accorded and day of payment given according to the terms of the contract between Martin and Wilson, but without the knowledge, privity or assent of Devers, the surety. A special replication to this plea was filed, and a rejoinder to the replication, without bringing the parties to issue. The court, without noticing the plea of payment, gave judgment for the plaintiff as upon a demurrer to the rejoinder, although no demurrer thereto appears in the record.

It was decided by this court in the case of Ward v. Johnson, 6 Munf. 6, 8 Am. Dec. 729, that a confession of judgment by the principal, with stay of execution for a definite time without the assent of the surety, did not, at law, discharge the surety from his liability.

In the case before us, the assurance of indulgence, it is alleged, was given in the covenant of Martin, who had been the holder of the bond, but who had brought suit thereon in the name of Ross, the obligee, for the use of Flowers. It is by no means clear that Martin had any authority, under the facts alleged in the plea, to control the debt at all. Giving to the plea, however, the construction most favorable to the defendant, and holding that Martin had control of the debt, and might enter into such a covenant for indulgence, yet the case falls within the principle declared in the case of Ward v. Johnson: A covenant not to sue for a limited time does not release the debt. It is equally well settled that, if a creditor shall make a contract with his principal debtor for an extension of the time of payment, he does not thereby afford the surety for the debt, a plea in bar in a suit at common law. The surety must seek relief, if entitled to any, in a court of equity. Ward v. Johnson, 6 Munf. 6, 8 Am. Dec. 729; Steptoe's Adm'rs v. Harvey's Ex'rs, 7 Leigh, 501.

I am therefore of opinion the court below might have refused to receive the plea, or, having received it, might have stricken it out, or, if a verdict had found the truth of the plea, might have rendered a judgment "non obstante veredicto." The court fell into error in overruling the plea.

The court, however, should not have rendered a judgment against the defendants without disposing of the issue on the plea of payment.

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The plaintiff can have no judgment until this issue shall be found in his favor.

I am of opinion to reverse the judgment, and to remand the cause for the purpose of trying the issue on the plea of payment.

The other judges concurred in the opinion of SAMUELS, J.

Judgment reversed.[14]

LIQUIDATORS OF OVEREND, GURNEY & CO., Limited, Appellants, v. LIQUIDATORS OF ORIENTAL FINANCIAL CORPORATION, Limited, Respondents.

(House of Lords, 1874. Law Rep. 7 Eng. & Ir. App. Cas. 348.)

This was an appeal against a decree of Lord Chancellor Hatherley, made in a suit which the present respondents had instituted against the present appellants, in order to restrain these appellants from prosecuting an action at law against these respondents to recover the amount of four bills of exchange, on which the names of the respondents appeared as acceptors. The facts of the case are set forth in detail in the report in the court below. L. R. 7 Ch. App. 142. The following is the summary of them necessary for the present report:

[14] This case is of merely historical interest, showing that the equitable defense of a covenant of forbearance was not always permitted at law.

"The original doctrine of the common law undoubtedly was that a court of law deals only with legal liabilities and legal discharges, and that, although an agreement to give time to the principal varies the relations between him and the surety, and thus constitutes an equitable discharge of the latter, yet that such a defense was exclusively cognizable by a court of equity, and could not be set up as a bar to an action at law. These doctrines may have been much relaxed by recent English decisions. * * * In some of the United States the old English doctrine seems to prevail. * * * But in a majority of the states the opposite doctrine prevails, and it is held that any defense which would avail a surety in equity may be made as well at law; and it has been decided in most of the supreme tribunals in this country that whatever will discharge a surety in equity will be equally effectual as a discharge at law, and that time given to the principal upon a contract which shall bind the creditor not to sue during that time will be a good defense to an action at law against the surety, whether the fact of the suretyship appear on the face of the contract or was shown by extrinsic evidence, if the creditor had notice of the true standing and relation of the parties." Heath v. Derry Bank, 44 N. H., at page 176 (1862).

The jurisdiction of equity is, however, not affected by the giving of the right to introduce the equitable defense at law. Heath v. Bank, 44 N. H. 177 (1862), obiter; Hempstead et al. v. Watkins, 6 Ark. 319, 358, 359, 42 Am. Dec. 696 (1845).

Courts of law in the United States therefore allow the equitable defense that the creditor has given a binding extension of time. Numerous cases to this effect will be found post, pp. 449 to 470; accord: Smith v. Clopton, 48 Miss. 66 (1873); and, similarly, the equitable defense that the creditor has parted with collateral of the debtor, see post, pp. 471 to 515; also Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311 (1829), after-acquired collateral; Rogers v. School Trustees, 46 Ill. 428 (1868).

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James McHenry, who, it afterwards appeared, was the agent in this country for the Atlantic & Great Western Railway Company, had discount dealings with Overend, Gurney & Co., and in June, 1864, obtained from them discount for bills amounting to £10,000., drawn by Léon Lillo, of Paris, on and accepted by the respondents. These bills formed part of a series of bills to a much larger amount, which the respondents had agreed in like manner to accept on receiving a commission of 4 per cent. These bills were not paid, but they were from time to time renewed, and Overend & Gurney took the renewals. On the 9th of January, 1866, the last renewed acceptances of the respondents fell due, and McHenry gave to the respondents a check on the appellants for £10,000., and the respondents then accepted four bills of exchange for £2,000., £2,000., £3,000., and £3,000. These bills were drawn on the respondents, not by the former drawer, Léon Lillo, but by Emile Deschamps, of Paris.

They were dated the 22d of January, 1866, and were to become due three months after date. They were on the same day deposited by McHenry with the appellants, and he gave the appellants a written guarantee in these terms:

"City Office, 23, Throgmorton Street, E. C.
"Atlantic and Great Western Railway,
"5 Westminster Chambers, Victoria Street, Westminster, S. W.
"London, 9th January, 1866.

"Messrs. Overend, Gurney & Co. (Limited).

"Gentlemen: In consideration of your agreeing to discount the bills of Emile Deschamps on and accepted by the Oriental Financial Corporation (Limited) for £10,000., due as per list at foot, I hereby agree to guarantee and indemnify you from all loss that you may incur by so doing; and in the event of same not being duly paid at maturity, I hereby engage to pay the amount of said bills on demand, and for the above-mentioned consideration I hereby give the guarantee of the Atlantic and Great Western Railway Company for the said bills for the said terms and conditions," etc.

Signed by W. B. Ford for McHenry.

The list of the bills was then given. They were all to fall due on the 6th of April, 1866.

In the course of March, 1866, McHenry had some interviews with Messrs. Birkbeck and Henry Edmund Gurney (managing the business of Overend, Gurney & Co., Limited), with whom he had other money transactions to a large amount, and he deposited with them shares of the Atlantic & Great Western Railway Company to the amount of $445,000. The agreement that was then arrived at between the parties was not reduced into writing, and was, in this suit, differently represented by Messrs. Birkbeck and Gurney on the one hand, and by McHenry on the other.

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The bills, on coming to maturity on the 6th of April, were dishonored. Notice of dishonor was given by the appellants to all the parties whose names were on the bills, and among the rest to the respondents, whose names appeared as acceptors. On the 9th of April Mr. Farmer, the solicitor of the respondents, called at Overend & Gurney's (Limited) Bank, and informed them that the bills had been accepted by the Financial Corporation for McHenry's accommodation and benefit, and must be paid by him. The answer that Mr. Farmer received was that the managing director would see Mr. McHenry in the course of the day.

On the 27th of April McHenry went to the appellants, who were then largely in advance to him, and had a meeting with Mr. Birkbeck and Mr. Gurney. McHenry delivered to them bills to a very considerable amount, among which were bills on Lillo for £38,000., and an agreement was come to between the parties. What that agreement was occasioned much discussion in the cause; but the Lords in their judgments adopted ultimately the statement of it as made by Mr. Birkbeck, which, as to the four bills now in question, was to this effect: "That the said four bills, for £3,000., £3,000., £2,000., and £2,000., should be held over during the currency of the bills on Léon Lillo for £38,000. given as additional security. The four bills on the plaintiffs' corporation (the present respondents) were then unpaid in the hands of the defendant company (the present appellants), and therefore could not be retired by them."

Both companies, the Overend & Gurney Company and the Financial Corporation, went into liquidation. On the 29th of October, 1867, payment of these bills was demanded by the liquidators of the Overend & Gurney Company from the liquidators of the Oriental Financial Corporation; but, liability on them being denied, an action was brought by the appellants in February, 1868, to recover the amount. In March, 1868, the respondents filed a bill in chancery to restrain this action, on the ground that they were mere acceptors for accommodation of McHenry, and that he was the principal debtor; that notice of those facts had been given to Overend & Gurney, who by their arrangement with McHenry of the 27th of April, 1866, made after such notice, had in fact released them from all liability on the bills. Evidence was taken on both sides, and in June, 1871, Vice Chancellor Malins made a decree whereby the bill filed by the liquidators of the Financial Corporation was ordered to be dismissed. On appeal, to Lord Chancellor Hatherley, this decree was reversed. L. R. 7 Ch. App. 142, in a note to which the previous judgment of Vice Chancellor Malins is given. The case was then brought up to this House.[15]

THE LORD CHANCELLOR (Lord CAIRNS). My Lords, the bills of exchange out of which the proceedings in this suit arose were four in number, and amounted in value to the sum of £10,000.; and I will

[15] The arguments of counsel have been omitted.

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ask your Lordships, in the first place, to observe the position of the persons who are liable upon the face of those bills of exchange. In form, the bills of exchange were drawn by a person, apparently a native of France, of the name of Deschamps; and they were drawn upon, and accepted here by, the Oriental Financial Corporation. The bills drawn and accepted in this way were drawn for the purpose of being used by a gentleman of the name of McHenry, who was a defendant in the original suit, and who appears to be the agent in this country for a railway company across the Atlantic, and these bills were obviously drawn, and their acceptance was obtained, for the purpose of having the bills used in the financial arrangements of that transatlantic railway company.

My Lords, the bills so drawn and so accepted were taken to the firm of the Overend & Gurney Company for the purpose of discount, and they were discounted by that firm; but at the time of the discount, and along with it, there was given by McHenry to this firm a guarantee, to the wording of which I will now direct your Lordships' particular attention. It is signed by a Mr. Ford, by procuration, for McHenry, and addressed to Messrs. Overend, Gurney & Co. It runs in these words: "Gentlemen: In consideration of your agreeing to discount the drafts of Emile Deschamps on, and accepted by, the Oriental Financial Corporation (Limited) for £10,000., due as per list at foot, I hereby agree to guarantee and indemnify you for all loss that you may incur by so doing, and in the event of same not being duly paid at maturity, I hereby engage to pay the amount of said bills on demand, and for the above-mentioned consideration I hereby give the guarantee of the Atlantic and Great Western Railway Company for the said bills for the said terms and conditions." This guarantee was, as I have stated, given to Overend, Gurney & Co. upon the occasion of the discounting of the bills.

Now I will assume, for it is stated by the directors of Overend, Gurney & Co. positively, and it is not denied, that in January, 1866, the time of the discounting of the bills, they were not aware of any relationship between the parties to the bills and McHenry which would impart to them the knowledge of McHenry being the principal, and the Financial Corporation Company being the surety. But, in point of fact, your Lordships find that that was the relationship between the parties. The giving of these bills of exchange, the drawing of them, and the acceptance of them were for the benefit of McHenry and his principals. McHenry was bound to provide the funds for the payment of the bills as between himself and the acceptors; and the relationship of principal and surety plainly existed between the parties.

That being the position of the parties, the bills of exchange became due on the 6th of April, 1866, and they were not paid at maturity. Notice of this fact was given to all the parties concerned. It was given to McHenry, it was given to the drawer, and it was given also, although that perhaps was unnecessary, to the acceptors. That no-

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tice was given apparently about the 9th of April, and I find that on the 9th of April the persons constituting the Oriental Financial Corporation informed Overend & Gurney of the exact position in which they stood as to McHenry. I will direct your Lordships' attention to the evidence on that point, because it is given in one affidavit, and is not the subject of any contradiction or of any dispute. Farmer, in his affidavit, says: "On the 9th of April I called at the place of business of Overend & Gurney. I saw one of the managing directors (whom I believe to be Mr. Birkbeck), and after stating to him that certain bills, namely, the bills in question, bearing the acceptance of the plaintiffs in the cause, in respect of which Overend, Gurney & Co. had claimed payment from the plaintiffs, were accepted by the plaintiffs merely for the benefit and accommodation of McHenry, and that such bills ought to have been paid or provided for by him at maturity, and referred the defendants, the company, to him with respect to the payment of the said bills of exchange, and the managing director informed me in reply that he should probably see McHenry in the course of the afternoon of the same day." Therefore, my Lords, at that time, which was three days after the maturity of the bills, Overend, Gurney & Co. were distinctly and clearly informed that, upon and in respect of these bills, the Financial Corporation stood in the situation of surety only, and that the person primarily liable to provide for the bills was McHenry.

But your Lordships will observe that it was not merely a formal intimation of this kind which was given to Overend, Gurney & Co. It was an intimation which was accepted and acted upon by them, because the managing director stated that he intended to see McHenry on the same day upon the subject; and your Lordships have it in evidence that from that day, the 9th of April, 1866, until the 5th of November, 1867, no application whatever on the subject of these bills was made to the Financial Corporation. Overend, Gurney & Co. seem to have thoroughly understood the position in which McHenry stood towards the Financial Corporation, as the person who was bound to provide for the payment of the bills.

Now, my Lords, that relationship having existed between the parties, and having thus been clearly brought to the notice of Overend, Gurney & Co., your Lordships will, I think, find that the decision of this case will turn upon a very short examination of certain facts which took place upon a subsequent day, the 27th of April, 1866. On that day there was a meeting between Mr. McHenry and two of the directors of Overend, Gurney & Co., Mr. Gurney and Mr. Birkbeck. There was apparently no person else at the meeting. The evidence which is given by Mr. McHenry upon the subject of what passed at that meeting, whether from confusion of mind or from want of memory, is so vague, and obviously so inaccurate, that I think both parties at your Lordships' bar agreed in placing no reliance upon it; and it is clearly evidence which cannot be accepted as a correct narrative of

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what took place. On the other hand, the evidence of the two directors of Overend, Gurney & Co. is completely consistent in all its parts, and the appellants at your Lordships' bar must, of course, have their case judged, and, indeed, are content to have their case judged, by the statement that those two gentlemen give as to what took place upon the day in question.

Now, what is stated by these gentlemen may be taken from the affidavit of one of them, the affidavit of Mr. Birkbeck, who says: "I deny the following statement contained in the tenth paragraph of" McHenry's answer, "namely, that 'it was also agreed between me' (meaning McHenry) 'and the managing directors that in consideration of such deposit the defendants should retire the four bills of exchange for £3,000., £3,000., £2,000., and £2,000., accepted by the plaintiffs as aforesaid, and also (to the best of my recollection and belief) the acceptance for £3,000. rediscounted by the defendants, the company, for the Joint Stock Discount Company as aforesaid,' or that it was agreed between James McHenry and me, this deponent, to any such or the like effect." Your Lordships will observe that Mr. Birkbeck denies a statement which had been made by McHenry, and then he replaces that statement by his own narrative of what was done. He says: "I say that the agreement was that the said four bills for £3,000., £3,000., £2,000., and £2,000. should be held over during the currency of the said bills on Léon Lillo for £38,000., given as additional security." Now it is admitted upon all sides that on this day there were given to Overend, Gurney & Co. by McHenry these bills of Léon Lillo for the amount of £38,000. Those bills were drawn by Léon Lillo, but not accepted. And it is also admitted that certain other arrangements were made at the same time which resulted in a part payment of the demand which Overend, Gurney & Co. had against McHenry.

And, my Lords, I cannot do better than read, in connection with this affidavit which I have last read, another statement from the same gentleman, Mr. Birkbeck, joining in that relation with Mr. Gurney. On the 27th of April, 1866, McHenry, "being unable to take up the last-mentioned bills, as well as others which the defendant held unpaid, proposed to us that the defendant company should discount £6,000. acceptances of Bailey Brothers, due on the 12th of August, 1866, against which they had made an advance of £5,000., and apply the margin of £1,000. towards payment of the said bills for £2,000., £2,000., £3,000., and £3,000.; and he gave to us, on behalf of the defendant company, drafts drawn by Léon Lillo upon the Bank of London," but not then accepted, for the balance.

Therefore, what your Lordships find is that the sum of £1,000. was applied, as far as it would go, in part payment, and these Lillo drafts were given for the balance. The explanation of the giving of those drafts, and the narrative of what accompanied the giving of them, is to be found in the second affidavit of Mr. Birkbeck, which I read first: "The agreement was that the said four bills," for the £10,000., "should

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be held over during the currency of said bills on Léon Lillo for £38,000. given as additional security." Now, my Lords, what is the meaning of these words, which really must be taken as the narrative, agreed between the parties, of what took place? What is the meaning of the words, it was agreed that the £10,000. bills "should be held over during the currency of the bills on Léon Lillo for £38,000."? If those words mean that the agreement between McHenry and Overend, Gurney & Co. was that the bills for £10,000. should not be put in suit as against the parties to the bills, namely, the acceptors and the drawer, but that Overend, Gurney & Co. should be left perfectly free to proceed against McHenry upon his guarantee, then I should be decidedly of opinion that there was nothing in an agreement of that kind which in any way discharged the sureties for the debt, but that, the creditor remaining at liberty to sue the principal debtor, there was nothing in the transaction of which the sureties could complain. But, on the other hand, if the meaning of these words is that the agreement was that no proceeding should be taken either upon the bills or upon the guarantee given for the payment of the bills, then it appears to me that the agreement would be one entered into to sue neither principal nor surety, but entered into at the instance, not of the surety, but of the principal, and was therefore one that would be open to all the vice of an agreement to give time to the principal debtor.

I must, my Lords, repeat, what is the meaning of these words? In point of fact, the names upon the bills of exchange no doubt were the names only of the drawer and of the acceptors; but, as I have just now observed to your Lordships, there cannot be a doubt that these bills were discounted by Overend, Gurney & Co., not merely upon the faith of the names upon the bills, of the drawer and the acceptors, but upon the faith of that guarantee which I have already read. For, if not, for what purpose was that guarantee given, and what is the stipulation in that guarantee, "I agree to indemnify you for all the loss that you may incur by discounting the bills, and, in the event of the same not being duly paid at maturity, I engage to pay the amount of the bills on demand"? My Lords, to all intents and purposes, as regarded Overend & Gurney, McHenry was exactly in the same position as to those bills as if his name had been found upon the bills as a party to them. He had promised to pay them on demand when they had reached maturity. Although he had given that promise, not upon the face of the bills, but upon a collateral writing, to all intents and purposes he was bound by whatever might be the fate of the bills.

I therefore repeat that, when your Lordships find that the agreement which, it is admitted, was come to, not at the instance of the sureties of the bills, not at the instance of the Financial Corporation, nor of Deschamps, but at the instance of McHenry, and that during this long period of eighteen months to which I have referred the sureties were taking no steps to shelter themselves from proceedings under the bills,

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but the only person who was taking proceedings to prevent the bills being put in suit was McHenry, and that there was obviously an important end to be gained by McHenry, just as much with regard to himself as with regard to the parties to the bills, namely, that the transatlantic railway company should not have its credit endangered by proceedings being taken against him, its agent—when, I say, your Lordships consider those circumstances, it appears to me that you cannot do otherwise than arrive at the conclusion that the agreement, which clearly was everything to him, that the bills should be held over during the currency of the bills of Léon Lillo, was an agreement that no proceedings should be taken in respect to those bills, either against McHenry or against the Financial Corporation Company.

And, my Lords, I venture to think that if, after that agreement was entered into, any proceedings had been taken against McHenry upon the guarantee, it would clearly have been open to McHenry to defend himself against any such proceedings by alleging (whether he would do it in the shape of a legal plea or an equitable plea, by a defense in a court of law or by proceedings in a court of equity, it is unnecessary to consider) that, whereas the guarantee was a guarantee that he would pay the amount of the bills on demand when the bills reached maturity, the holders of those bills had, at his instance, agreed to defer taking any proceedings upon them, and had agreed that the bills should be held over during the currency of the Léon Lillo bills. My Lords, I need not point out to your Lordships that that was a perfectly valid agreement. It was an agreement for good and valuable consideration, and the only question which can arise is as to the construction of those words to which I have referred. In my opinion, the agreement to hold over the bills had the effect of protecting during the continuance of that agreement both the parties whose names were on the bills, and also McHenry himself, from any proceedings.

Now, my Lords, it is said that this case was not sufficiently alleged in the pleadings. It appears to me that it was the supposition of the plaintiffs, when the bill was first filed, that the effect of what was done on the 27th of April was at once to put an end to the £10,000. bills by an arrangement under which the Lillo bills, and other securities, were accepted as payment. It was found out, as the suit proceeded, that that was not the view taken by Overend, Gurney & Co., although it was the view of McHenry as to what took place on the 27th of April. On the other hand, Overend, Gurney & Co., through their directors, alleged that what took place was not an agreement to terminate the bills, or to pay the bills, but an agreement to hold over the bills in the way I have described. Thereupon the bill was amended in a manner which, although it may be criticised as somewhat curt and bare in the allegation, is, as it appears to me, sufficient for the purpose in view. "The plaintiffs charge that, even if the agreement was such as the defendants, the company" (that is Overend, Gurney & Co.), "allege the de-

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fendants, the company, at the same time they made the same, well knew that the plaintiffs were sureties only for James McHenry, and that the defendants, the company, by giving time to James McHenry without their privity or consent for the payment of the said bills of exchange, have released the plaintiffs from all liability to pay the same."

Then, my Lords, it was said that the knowledge that the Financial Corporation was surety was not obtained by Overend, Gurney & Co. until after the bills became due; and inasmuch as the contract arising out of and connected with the bills was made before Overend, Gurney & Co. had any knowledge of that suretyship, their rights and their powers of proceeding under that contract ought not to be interfered with in consequence of knowledge subsequently obtained. My Lords, it appears to me that after the case which was referred to at the bar, decided by your Lordships' House, that of Oakley v. Pasheller, 4 Cl. & F. 207, it is impossible to contend, if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply.

My Lords, it was then said that at all events you must read the statement made by Mr. Birkbeck as to the agreement that was come to as if it implied that all the rights were reserved by the agreement against the surety, and that, inasmuch as the words with regard to the Lillo bills are that they were given "as additional security," the giving of additional security does not discharge in any way the surety.

My Lords, it is quite true that the giving of additional security will not of itself discharge a surety; but if the additional security is given upon a contract to give time, in consideration of this giving of the additional security, then time given under those circumstances, apart from the consent of the surety, is a discharge of the liability of the surety. I cannot find in the words which I have read any reservation of right whatever as against the surety. If I am right in the construction which I have put upon it, it is a voluntary agreement, entered into with McHenry, to sue no person at all for the period of time mentioned. If that is so, it is an agreement not to sue the surety, and there is no reservation of right as against that surety.

My Lords, I certainly think that the conclusion at which the late Lord Chancellor arrived in this case is entirely correct, and I therefore submit to your Lordships that the appeal should be dismissed with costs.

Lord CHELMSFORD. My Lords, the only question in this case is one entirely of fact, which is whether the agreement by Overend, Gurney & Co. with Mr. McHenry to hold over the bills upon which he was the principal, and the respondents the sureties, during the currency of the

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bills drawn by Lillo, involve a giving of time to the principal? The agreement is proved by Mr. Birkbeck, one of the appellants, who states that the agreement was that the four bills should be held over during the currency of the said bills on Léon Lillo for £38,000. given as additional security. During the course of the argument I certainly entertained very great doubt as to what was the construction of this agreement; but, upon consideration, I am disposed to agree with the view, which has been taken by my noble and learned friend on the woolsack, that it amounted to this: That they would not, during the currency of Lillo's bills, place McHenry in the position of being sued. That being so, it is quite clear that it was a giving time to the principal; and upon this short ground I agree with my noble and learned friend that the decree of the Lord Chancellor ought to be affirmed.

Lord O'HAGAN. I can add nothing material to the reasoning by which my noble and learned friend on the woolsack has sustained an opinion with which I concur. The question is a short and a clear one. It is a question as to the construction of a contract contained in a very few words, and is presented to us without any obscurity arising from a conflict of evidence. It seems to me a case without difficulty in law, or doubt as to facts.

The matter stands simply thus: Mr. McHenry, the person who entered into the contract, had an interest in it, either on his own account or for those whom he represented—the Atlantic & Great Western Railway Company. He came to make the contract and to settle its terms, and by him it was made accordingly. In entering into that contract he procured the making of it for good consideration. He gave additional security, and, upon his giving it, the parties with whom he dealt agreed that they would not, for a certain period, sue upon the bills which were at that time in circulation and in their hands. I think it clear, under such circumstances, that the agreement was not to have a merely limited effect, protecting only the persons who had become sureties, but that according to the intention of the parties it was to suspend all action upon the bills, or in relation to them, directly or indirectly, for the period during which it was to operate.

Such being, as I conceive, the meaning of the contract, it seeems to me that it would have been a complete breach of it, between Overend, Gurney & Co. and Mr. McHenry, if, during the period of the currency of the bills held by the plaintiffs, they had taken any step whatever for the purpose of obtaining payment. I think, also, that if the guarantie, to which my noble and learned friend on the woolsack has referred, had been sued upon at any time, during that period, it would have been impossible to enforce that guarantie, or to encounter a defense which might have been presented, either in the shape of an equitable suit or a plea at law, relying on the case that there had been, for good consideration, a contract to suspend any action for the recovery of the money affected by the guarantie.

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I am, therefore, of opinion that the judgment of the Lord Chancellor ought to be sustained.

Order appealed from affirmed, and appeal dismissed, with costs.[16]

HALL v. CAPITAL BANK OF MACON.

(Supreme Court of Georgia, 1883. 71 Ga. 715.)

BLANDFORD, Justice. The Capital Bank brought an action upon the following paper, viz.:

"$325.50 Macon, Ga., July 12, 1880.

"Thirty days after date I promise to pay to the order of L. W. Rasdal, agent, three hundred and twenty-five dollars and 50/100 dollars at Capital Bank, Macon, Ga., value received.

"[Signed] Roland B. Hall."

Indorsed: "L. W. Rasdal, Agent."

The defendant, Hall, pleaded that he was only a security on the note; that the note was made for the benefit of Rasdal, who discounted it at plaintiff's bank; that Hall got no part of the proceeds from the bank; when the note fell due, it was not presented to Hall for pay-

[16] Accord: Zapalac v. Zapp, 22 Tex. Civ. App. 375, 54 S. W. 938 (1900); Wheat v. Kendall, 6 N. H. 504 (1834); Fuller v. Quesnel, 63 Minn. 302, 65 N. W. 634 (1895); Smith v. Clopton, 48 Miss. 66 (1873). See, also, note in 8 H. L. R. 56 (1895), on "An Unfortunate Creditor."

Compare Insurance Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118 (1892).

Contra: Fentum v. Pocock, 5 Taunton, 192 (1813); Wilson v. Isbell, 45 Ala. 142 (1871), obiter; Cronise v. Kellogg, 20 Ill. 11 (1858).

Parol evidence to show that the surety's true position was known at the time the creditor made the original contract is generally admitted. Hubbard v. Gurney, 64 N. Y. 457 (1876); Branch Bank v. Darrington, 9 Ala. 949 (1846); Scott v. Scruggs, 60 Fed. 721, 9 C. C. A. 246 (1894). But contra: California Nat. Bank v. Ginty, 108 Cal. 148, 41 Pac. 38 (1895). Heath v. Derry Bank, 44 N. H. 174 (1862), the note reading, "all as principals promise to pay."

If, however, the joint obligors have contracted by common-law specialty, the doctrine of estoppel by deed excludes parol evidence that the obligee had knowledge of the suretyship when he accepted the specialty. Sprigg v. Bank, 35 U. S. 257, 9 L. Ed. 416 (1836). See title, "Estoppel by Deed," Fed. Dig. vol. 2, cols. 4266–4268.

The effect of modern statutes in certain jurisdictions abolishing distinctions between contracts under seal and simple contracts must be taken into consideration. See, e. g., Rogers v. School Trustees, 46 Ill. 428 (1868).

See, on the effect of the negotiable instrument law upon the doctrine of the principal case, Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329 (1908). And see, also, the note by Robert T. McCracken, Esq., in 1 University of Pennsylvania Law Review and American Law Register (vol. 56, Old Series) p. 341, and other cases cited therein. See, also, Bradley Engineering Co. v. Heyburn (Wash.) 106 Pac. 170 (1910).

See note by T. A. Street in 11 Law Notes (Northport) 105. Other cases arising under the act are in notes, 20 H. L. R. 646, and 21 H. L. R. 55.

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ment; that after it became due the bank extended it with Rasdal for 12 months, on the condition of 1 per cent. per month paid by Rasdal, without the knowledge or consent of Hall; that when the note fell due Rasdal was solvent; that Hall was not advised of the non-payment of the note until Rasdal had become insolvent; and that the bank was fully advised that Hall was only a security at the time it discounted the note.

The plaintiff demurred to the sufficiency of this plea. The court sustained the demurrer and dismissed defendant's plea, and this ruling forms the subject of the complaints by the plaintiff in error.

The question is as to the real relations of the parties to this note or contract. After the indorsement of a promissory note, the maker stands in the position of an acceptor to a bill of exchange, and the indorser in that of the drawer. As to the holder, the maker (now acceptor) is primarily liable, and the indorser (now drawer) is secondarily liable. And the transaction stands thus: The indorser says to the holder that, if the maker does not pay the note at maturity, I will, and such is his liability. The point of resemblance between a promissory note and a bill of exchange being thus fixed, the law relative to bills of exchange becomes applicable to promissory notes. 2 Burr. 676; Chitty on Bills, 521; Stewart v. Parker, 55 Ga. 656.

According to the statements and allegations in defendant's plea, Rasdal was liable as the maker, and Hall was liable as an accommodation acceptor, to the holder, the plaintiff in this action. An accommodation indorser is considered merely as a security. The form of the contract is immaterial. Code, § 2151. The plea avers that the bank, when it took this note, knew that Hall was not interested in the same; that he was merely surety for Rasdal, and when he drew this bill, or made this note, he did it merely for the accommodation of Rasdal, who was to pay the same, and to whom the bank extended time of payment, upon a consideration promised by Rasdal, without the consent of Hall. We have seen that as to this transaction Hall was merely an accommodation acceptor, and he may show that he is but a security. Boynton v. Twitty et al., 53 Ga. 217, fully sustains this principle.

In the case of Parmelee v. Williams [72 Ga. 42], decided at the present term of this court, it was held that indulgence by the holder to the acceptor, without consent of the drawers, upon consideration, would discharge the drawers, who were but sureties in that case; and indulgence to the indorser in this, who is the drawer, as it were, and primarily liable on this paper, on consideration stated in the plea, will discharge the accommodation acceptor, who is but a surety in this case. See the case last referred to. So it appears that the judgment of the court below, sustaining the demurrer and dismissing defendant's plea, was error, and this judgment is reversed.

Judgment reversed.

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STEWART'S ADM'R, Plaintiff in Error, v. PARKER, Defendant in Error.

(Supreme Court of Georgia, 1876. 55 Ga. 656.)

WARNER, Chief Justice. This was an action brought by the plaintiff against the defendants on a promissory note, of which the following is a copy: "Sumter County, February 9, 1860.

"Ten months after date we, or either of us, promise to pay to our own order, in the city of * * * $5,000.00, for value received, and with interest from date, if not punctually paid.

"[Signed] James Stewart.
"A. S. Cutts."

The following indorsement was on the back of the note:

"Pay W. B. Parker, or order. James Stewart.
"A. S. Cutts."

The defendant, Stewart, filed a plea to the action, in which he alleged that he was a security on the note for Cutts, which fact was known to the plaintiff, and that when said note became due the plaintiff, in consideration that Cutts would execute him a deed to certain lands owned by him, agreed that he would extend the time of payment of said note for 12 months from that time for the consideration aforesaid, and that said Cutts did execute and deliver said deed, all of which was without the knowledge or consent of said defendant, Stewart, whereby he claimed to be released and discharged from the payment of the note sued on.

It was proven on the trial that Cutts, on the 18th of July, 1866, executed and delivered to Parker a deed to 3,600 acres of land in Florida as collateral security for the debt, in consideration of which Parker agreed to give him further time on said note to the April term of the court, 1868. The correspondence between Parker and Cutts was read in evidence, and also the testimony of Parker, in which he denied that Stewart was security for Cutts on the note. Cutts stated in his evidence that Stewart was security for him on it.

In view of the evidence contained in the record, the court charged the jury "that if you believe, from the evidence submitted to you in this case, that James Stewart was only security on the note sued on, and not interested in the consideration, which fact was known to the plaintiff, Parker, and after the note became due he gave the principal, Cutts, time on the same, or extended the time aforesaid for a valuable consideration, then that would discharge James Stewart's estate from all liability on said note, and you ought to find for the defendant. If Parker took the deed submitted in evidence to the lands in the state of Florida, either as a conveyance or as collateral security, that is a valuable consideration. Before the security can be discharged on the

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plea of indulgence given to his principal, the creditor must know that he is such security. The forbearance must be for a definite time and for a consideration binding in law. The indulgence must be without the knowledge or consent of the security before the security is discharged upon the plea of indulgence. The jury must believe that the plaintiff gave indulgence to Cutts for a valuable consideration, and without the knowledge and consent of Stewart, before they can discharge the security from liability, and that Parker knew at the time that Stewart was only security."

The jury found a verdict for the plaintiff for $4,750. The defendant made a motion for a new trial on the ground that the verdict was contrary to law and the evidence, and for error in the charge of the court, which motion was overruled, and the defendant excepted.

If Parker knew that Stewart was security on the note at the time the contract for indulgence for a consideration was made with Cutts, then the security would have been entitled to be discharged, under the law; but if Parker did not know, at the time of the contract with Cutts for indulgence, that Stewart was a security on the note, then Stewart would not have been entitled to be discharged from its payment. In the first part of its charge, the court gave the law applicable to the facts of the case to the jury, substantially correctly, and if it had stopped there we should not have interfered with the verdict; but the court did not stop there, but charged the jury that "the indulgence must be without the knowledge or consent of the security before the security is discharged upon the plea of indulgence; that the jury must believe that plaintiff gave indulgence to Cutts for a valuable consideration, and without the knowledge and consent of Stewart, before they can discharge the security from liability." This latter portion of the charge was error.

If the indulgence had been given by the plaintiff to the principal debtor for a consideration without the consent of the security, the latter would have been discharged, although he had no knowledge of it at the time. It is not necessary that the security should have knowledge of the contract for indulgence for a consideration, made by the plaintiff with the principal debtor, at the time it is made and the indulgence given, to entitle him to be discharged. It is quite sufficient if it be done without the security's consent, whether he has knowledge of it or not. How far, and to what extent, the jury may have been influenced in making up their verdict by this erroneous charge of the court, we cannot tell, in view of the facts in the case. It may have controlled their verdict, and for that reason we reverse judgment, and order a new trial.

Let the judgment of the court below be reversed.[17]

[17] Accord: Davies v. Stainbank, 6 De Gex, M. & G. 679 (1855).

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HAYDENVILLE SAVINGS BANK v. PARSONS et al.

(Supreme Judicial Court of Massachusetts, 1884. 138 Mass. 53.)

Contract, upon a joint and several promissory note for $2,500, dated October 20, 1877, payable in six months after date to the plaintiff, and made by Ansel Wright as principal and by the defendants as sureties. Answer, that the plaintiff had discharged the sureties by agreeing with Wright to extend the time of payment of the note. Trial in the superior court, before Staples, J., who ruled that the action could be maintained, and directed a verdict for the plaintiff; and the defendants alleged exceptions. The facts appear in the opinion.

HOLMES, J. It has been held repeatedly in this commonwealth that receipt of interest in advance upon an overdue promissory note from the maker does not of itself import such a giving of time as will discharge the sureties. Oxford Bank v. Lewis, 8 Pick. 458; Blackstone Bank v. Hill, 10 Pick. 129; Central Bank v. Willard, 17 Pick. 150, 28 Am. Dec. 284; Agricultural Bank v. Bishop, 6 Gray, 317; Jennings v. Chase, 10 Allen, 526. The most that the evidence for the sureties in the case at bar tended to show was such a payment, and as we think, not even that. It is true the note mentioned no rate of interest, and that the sum paid was more than the statutory rate of 6 per cent. But this can make no difference; for if payment at 6 per cent. of a sum which would not be legally due if the debtor insisted on his right to pay at maturity, or unless payment of the note was postponed for a certain time, does not postpone the right to collect the note, payment at 7 per cent. will not do it.

In this case the maker asked for an extension until his father's estate could be settled, and was answered by the plaintiff's treasurer on behalf of the finance committee: "We have concluded to let the note lay along, if you keep up the interest as you have done." A few days later, July 24, 1878, the maker received a letter from the treasurer saying: "Your interest must be paid." The next day he paid a sum equal to 7 per cent. per annum for six months on the amount of the note, which was not then six months overdue. It was the same sum that the maker had paid several times when renewing. The treasurer made the following indorsement on the note: "July 25, 1878. Received on the within note eighty-seven and $^{50}/_{100}$ dollars ($87.50)." The maker "called his attention to the fact that it was not specified that it was paid as interest; he said it was paid as interest, and he preferred to have it indorsed in that way." Before the next six months had elapsed, another similar payment was made, and indorsed in like form. Subsequent payments were made at the end of each successive six months, and were indorsed as interest.

It seems to us that the import of the first transaction was that the bank insisted on receiving the money ambiguously—to be applied as interest if the bank should allow the note to run six months; other-

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wise, to be applied upon the note—for the very purpose of avoiding even such an implication of extension as might be drawn from the receipt of interest eo nomine in excess of what was due at the time. The bank made no semblance of a promise, except to let the note lie along, which means that it reserved the right to sue at any time, and it declined to indorse the payment as interest. Whether the bank might have been bound by the words of indorsement to treat the sum as paid in respect of interest then legally due upon the note and principal is not before us.

Payments and the indorsement of payments of interest at 7 per cent., in respect of time since the note was due, do not amount to a change of the contract, or satisfy the statutory requirement of an agreement in writing to bind the maker to pay that rate in the future.

The fact that one surety told the plaintiff's treasurer to sue the note was immaterial. Frye v. Barker, 4 Pick. 382; Bellows v. Lovell, 5 Pick. 307. It is unnecessary to consider the authority of the treasurer to bind the bank, which is the only other question argued for the defendant. Exceptions overruled.[18]

DODGSON et al. v. HENDERSON.

(Supreme Court of Illinois, 1885. 113 Ill. 360.)

Appeal from the Appellate Court for the Third District. Heard in that court on appeal from the Circuit Court of Greene County; Hon. George W. Herdman, Judge, presiding.[19]

Mr. Justice CRAIG delivered the opinion of the court.

This was a bill in equity, brought by Edwin Henderson, to enjoin the prosecution of an action brought to collect a certain promissory note, executed by George B. Allen, as principal, and complainant, as surety, bearing date November 6, 1875, whereby they jointly and severally promised to pay, twelve months after the date thereof, to Christopher Dodgson, $2,000, with interest at 10 per cent. per annum. Dodgson died testate, April 4, 1878, and the executors of the estate, with George B. Allen, the principal on the note, were made parties defendant to the bill.

It is alleged in the bill that Allen was principal, and complainant surety, on the note; that Allen paid the interest on the note as it became due, up to November 6, 1876, and on January 10, 1877, Dodgson agreed with Allen to extend the time of payment to the 6th

[18] In Uniontown Bank v. Mackey, 140 U. S. 220, 11 Sup. Ct. 844, 35 L. Ed. 485 (1891), it was held that payment of interest in advance would not justify the inference of a binding extension, where the creditor holding overdue paper sent blank notes for renewal by all parties, and in ignorance of the death of one of the indorsers accepted the payment of interest in advance from the maker.

[19] The arguments of counsel are omitted.

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day of November, 1879, in consideration of the prompt payment by Allen, annually, of the interest; that Allen, in consideration of said promise of extension of the time of payment, agreed with Dodgson to keep the amount named in the note ($2,000) until November 6, 1879, and pay the interest thereon, annually; that the extension of the time of payment was made without the knowledge or consent of the complainant. It is also set up in the bill that an action at law had been brought in the circuit court of Greene county, against Allen and Henderson, on the note, which was pending when the bill was filed; that Henderson set up as a defense to the action that he was surety on the note, and that after the note became due Dodgson, for a valuable consideration, agreed with Allen to extend the time of payment to November 6, 1879, without the knowledge or consent of complainant. It is also alleged that Allen is the only person by whom the agreement to extend the day of payment can be proven; that the executors will not consent that Allen may appear as a witness and testify in the action at law. The bill contains other allegations; but it will not be necessary to state them here, as enough has been set out to show the grounds upon which the complainant relies for relief.

It is apparent from the allegations of the bill, as well as from the evidence introduced in support of the bill, that complainant could not make a defense to the action at law, for the reason that Allen, who was the only person who knew that an agreement had been made to extend the time of payment of the note, was not a competent witness in the action at law. Section 2, c. 51, p. 488, of the Revised Statutes of 1874, expressly excludes a defendant from testifying in an action brought by an executor, like the one brought against Allen and Henderson. Resort to a court of equity was therefore a necessity—the only tribunal where relief could be obtained. In Bradshaw, Adm'r, v. Combs, 102 Ill. 428, we held that a bill in equity was an appropriate remedy in a case of this character, and that the principal on the promissory note, on a bill filed against an administrator or executor by the surety, was a competent witness. As to complainant's right to file the bill, and upon the question of the competency of Allen as a witness, the case cited is conclusive, and no further notice need be taken of that question.

The next question to be considered is whether, after the note became due, the time of payment was extended by an agreement between the payee of the note and the principal maker, Allen, based upon a valid consideration, and the effect of such a contract. Allen testified that in the latter part of the year 1877 an agreement was made between him and Dodgson that the time of payment should be extended another year—until November 6th, following; that he agreed to keep the money for that time, and pay the interest promptly. We think the contract to extend the time of payment valid, and based upon a sufficient consideration. The effect of the transaction was this:

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About the end of the second year after the loan was made, Dodgson agreed to extend the time of payment one year if Allen would keep the money that time and pay 10 per cent. interest thereon promptly at the expiration of the time. The agreement to keep the money another year and pay the interest thereon was a sufficient consideration for the promise of the payee to extend the time of payment. It may have been, and doubtless was, of great benefit to Dodgson to secure a loan another year at 10 per cent. interest. Had the money been paid in, a customer might not be found ready to borrow at so large a rate of interest, and hence the money might lie idle in the owner's hands a whole year. But, however that may be, there can be no doubt that the agreement to keep the money a whole year and pay a specified rate of interest is a consideration which will support the agreement to extend the day of payment.

As to the effect of an agreement to extend the time of payment, upon the rights of the surety, when made without his knowledge or consent, the law is well settled. As early as Davis v. People, 1 Gilman, 409, this court held that if the creditor, by a valid and binding agreement, without the assent of the surety, gives further time for payment to the principal, the surety is discharged, both at law and in equity, and it makes no difference whether the surety may be thereby actually damnified or not. The same doctrine was announced in Waters v. Simpson, 2 Gilman, 570, and in Crossman v. Wohlleben, 90 Ill. 537. The contract of a surety is one that should be construed strictly, and in no case can he be held liable beyond the terms and conditions of the contract to which he gave his assent; and any binding contract entered into between the principal debtor and the creditor, which works a substantial change in the original contract, when made without the consent of the surety, will release the surety. An agreement based upon a good consideration, and binding on the parties, produces this result. Such was the contract proven in this case.

We are therefore of opinion that the decree of the circuit court was correct, and the judgment of the appellate court will be affirmed.

Judgment affirmed.[20]

[20] Accord: Obiter, Crossman v. Wohlleben, 90 Ill. 537 (1878); obiter, English v. Landon, 181 Ill. 614, 54 N. E. 911 (1899); Wheat v. Kendall, 6 N. H. 504 (1834); Fowler v. Brooks, 13 N. H. 240 (1842); obiter, Bailey v. Adams, 10 N. H. 162 (1839); McComb v. Kittridge, 14 Ohio, 348 (1846), the interest being above legal rate, but excess only being forfeitable by law; Fawcett v. Freshwater, 31 Ohio St. 637 (1877); Chute v. Pattee, 37 Me. 102 (1854); obiter, Brown v. Prophit, 53 Miss. 649 (1876); Simpson v. Evans, 44 Minn. 419, 46 N. W. 908 (1890), interest at lower rate; Eaton v. Whitmore, 3 Kan. App. 760, 45 Pac. 450 (1896), interest at lower rate; obiter, Shuler v. Hummel, 1 Neb. (Unof.) 204, 95 N. W. 350 (1901); Reed v. Tierney, 12 App. Cas. (D. C.) 165 (1898); Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571 (1897).

See note, 13 H. L. R. 63.

Contra: See cases under note to Kellogg v. Olmstead, ante, p. 435.

The proposition is not controverted that an agreement of extension of time

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BOATMEN'S SAVINGS BANK, Appellant, v. JOHNSON et al., Respondents.

(St. Louis Court of Appeal, Missouri, 1887. 24 Mo. App. 316.)

Appeal from the St. Louis Circuit Court; Shepard Barclay, Judge.[21]

THOMPSON, J., delivered the opinion of the court.

The single question presented by this record is whether an indorser or surety is released by a composition agreement between the holder of the obligation and the maker, acceptor, or other principal debtor,

must be binding between principal and creditor in order to work the surety's discharge.

Hence a mere naked promise by the creditor to the debtor of further time will, no more than the laches of the creditor, discharge the surety.

Nor will laches or extension for a given time, in the absence of an express contract to extend, discharge the surety, even if interest be paid at the end of the extension. Johnston v. Thompson, 4 Watts (Pa.) 446 (1835).

Payment of interest when due is plainly not conclusive on the question of a binding agreement to extend time of payment. Bitler's Estate, 30 Pa. Super. Ct. 84 (1906). See Higgins v. McPherson, 118 Ill. App. 464 (1905).

But if an express promise to extend the time has a consideration, the surety is discharged—e. g., the receipt of notes for installment due on a specialty (Rees v. Berrington, 2 Ves. Jr. 540 [1775]), or the receipt of new notes payable on time, when not taken as mere collateral for notes due (Hubbard v. Gurney, 64 N. Y. 457 [1876]; Morehead v. Citizens' Deposit Bank, 130 Ky. 414, 113 S. W. 501, 23 L. R. A. [N. S.] 141 [1908]), or the receipt of a new mortgage signed by the wife of the mortgagor (Holland v. Johnson, 51 Ind. 346 [1875]), or the receipt of a mortgage (Branch Bank, etc., v. James, 9 Ala. 949 [1846]; Stewart v. Parker, 55 Ga. 656 [1876]), or the receipt of a note for a debt (Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529 [1876])—in accord with the presumption of the law merchant that a bill or note is conditional payment.

An express promise to extend the time of payment may, on the principle of the bilateral contract, be supported either by an executed consideration (i. e., payment of interest in advance) or (as exemplified by the principal case) by an executory consideration (i. e., the promise to pay interest at the end of the extension).

Though no conflict apparently exists on the proposition that interest paid in advance, where an express promise of extension is given in exchange therefor, will discharge the surety—Stillwell v. Aaron, 69 Mo. 539, 33 Am. Rep. 517 (1879); Hamilton v. Winterrowd, 43 Ind. 393 (1873); Scott v. Saffold, 37 Ga. 384 (1867); Hallock v. Yankey, 102 Wis. 41, 78 N. W. 156, 72 Am. St. Rep. 861 (1899)—there are contradictory views on the question whether the mere payment of interest in advance is sufficient evidence to submit to a jury, from which evidence they may find a promise to extend the time.

The affirmative view is maintained in Hollingsworth v. Tomlinson, 108 N. C. 245, 12 S. E. 989 (1891), and Wakefield Bank v. Truesdell, 55 Barb. (N. Y.) 602 (1864); and the negative view in Haydenville Bank v. Parsons, 138 Mass. 53 (1884), ante, p. 463, Oxford Bank v. Lewis, 8 Pick. (Mass.) 458 (1829), and Citizens' Bank v. Moorman, 38 Mo. App. 484 (1889).

There is also a difference of judicial opinion whether a promise to pay interest in exchange for a promise to extend the time discharges the surety: some jurisdictions holding this to be a binding agreement, as in the principal case. McComb v. Kittridge, 14 Ohio, 348 (1846), Wheat v. Kendall, 6 N. H. 504 (1834), and Reynolds v. Barnard, 36 Ill. App. 218 (1890). Others holding that this agreement is nudum pactum, as in Kellogg v. Olmsted, 25 N. Y. 189 (1862), ante, p. 435, and cases in that note, and Reynolds v. Ward, 5 Wend. (N. Y.) 501 (1830).

[21] The arguments of counsel and a portion of the opinion dealing with a collateral question have been omitted.

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which composition, in express terms, reserves every right and remedy which the holder, or obligee, has against other persons. The question must be answered, upon authority, that such an agreement does not discharge the indorser or surety.

Two principles are universally conceded in respect of the rights of sureties, and are not disputed by the parties to this proceeding: (1) That a valid agreement between a creditor and his principal debtor, whereby the creditor, in consideration of the payment of a part of the debt, discharges the principal debtor, will, without more, operate to discharge a surety. (2) That an agreement between a creditor and his principal debtor, whereby the creditor agrees, for a consideration, to extend the time of payment, will, without more, operate to discharge a surety.

But it is an exception to the former of these rules, equally well settled, that such an agreement will not operate to discharge a surety, where the agreement itself contains an express reservation of the remedies of the creditor against sureties, or against all persons other than the principal debtor, who may be liable. Ex parte Gifford, 6 Ves. 805, 807, per Lord Eldon, L. C.; Hubbell v. Carpenter, 5 N. Y. 171; Sohier v. Loring, 6 Cush. (Mass.) 537; Tobey v. Ellis, 114 Mass. 120; Mueller v. Dobschuetz, 89 Ill. 176, 182; Stirewalt v. Martin, 84 N. C. 4; Morse v. Huntington, 40 Vt. 488, 496. This principle was recognized by this court in Broadway Savings Bank v. Schmucker, 7 Mo. App. 171.

It is an equally well-settled exception to the second of these rules that such an agreement will not operate to discharge a surety, where the agreement itself contains an express reservation of the remedies of the creditor against sureties, or against all persons other than the principal debtor who may be liable. Ex parte Glendenning, 1 Buck, 517; Boulthee v. Stubbs, 18 Ves. 20, 26; Nichols v. Norris, 3 Barn. & Ad. 41; Clagett v. Salmon, 5 Gill & J. (Md.) 314; Wyke v. Rogers, 1 De G., M. & G. 408; Melville v. Glendenning, 7 Taunt. 126; Bangs v. Strong, 10 Paige (N. Y.) 11; Bank v. Lewis, 8 Pick. (Mass.) 458; Blackstone v. Hill, 10 Pick. (Mass.) 129; Bank v. Lineberger, 83 N. C. 454, 35 Am. Rep. 582; Vielle v. Hoag, 24 Vt. 46. Our Supreme Court made a ruling which rests upon similar reasons in Rucker v. Robinson, 38 Mo. 154, 90 Am. Dec. 412.

These two exceptions to the two rules above stated rest upon the same principle. They are grounded upon the principle that, where a contract expressly reserves the remedy of the creditor against other persons (which includes sureties), the sureties are in no way prejudiced by the agreement. By entering into such an agreement, the principal debtor impliedly consents that whatever remedies his sureties have against him shall remain open to them. They are thereafter at liberty to pay the debt at once, and proceed immediately against their principal for reimbursement. An examination of many decisions

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shows that the principles which support these two exceptions to the respective rules above stated are precisely the same. Courts adopt the same mode of reasoning in the two cases, and cite interchangeably decisions where the agreement was for a discharge of the principal debtor, and where it was merely for an extension of time to him.

This principle has been applied in a number of cases where the agreement was merely that the creditor would not sue the principal debtor within a stated period of time. Price v. Barker, 4 El. & Bl. 760, 778, 30 Eng. L. & Eq. 157; Kearsley v. Cole, 16 Mees. & W. 128, 135; Perkins v. Gilman, 8 Pick. (Mass.) 229; Fullam v. Valentine, 11 Pick. (Mass.) 156; Kenworthy v. Sawyer, 125 Mass. 28; Hagey v. Hill, 75 Pa. 108, 15 Am. Rep. 583. In these cases, where there is a reservation of the remedies of the creditor against all other persons, or against sureties, the reasons upon which the courts refuse to discharge the sureties, are twofold: (1) The reason above stated, that the agreement in no way prejudices the surety as to any remedy which he may have against his principal. (2) The additional reason that a covenant not to sue cannot be pleaded in bar of an action, in case it is brought in violation of the covenant, the courts proceeding upon the refinement that such a covenant affords merely the ground of an action for damages. This distinction was noticed by our Supreme Court in Rucker v. Robinson, supra.

Whether it is well, or ill, founded, we need not now consider. Assuming that it is well founded, the defendant's position is not helped, because, in the cases where the agreement was merely an agreement not to sue, the courts have universally rested their decisions as well upon the reason that the sureties were not prejudiced by the agreement, and hence not discharged, as upon the reason that the agreement did not prevent the creditor from suing the principal debtor at any time. An examination of numerous cases convinces us that, with one or two isolated exceptions, they afford no ground for raising the distinction, which has been attempted in this case, between agreements not to sue and agreements to discharge the principal debtor entirely, reserving rights against all other persons. We should add that the statement of Judge Wagner, in State ex rel. v. Matson, 44 Mo. 305, 308, that "a release of the principal will always discharge the surety," was an obiter dictum and did not correctly state the law. Nor is there anything in the provisions of section 666, Revised Statutes, to which we have been cited, which changes the rule of the common law on this subject.

We find, then, that the exception to the general rule, which supports the plaintiff's claim in this case, has been thoroughly settled in England, and in this country, by the most authoritative courts; and as we have no jurisdiction to change the law, we must hold that the circuit court erred in the view that the defendant was not liable, and in nonsuiting the plaintiff. * * *

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The judgment will be reversed, and the case remanded. It is so ordered. All the Judges concur.[22]

HUTCHINSON v. WRIGHT.

(Supreme Court of New Hampshire, 1881. 61 N. H. 108.)

Assumpsit, for the balance of two notes, payable to the plaintiff in one year, and signed by C. S. Peabody & Co. and the defendant. The debt was that of Peabody & Co., and the defendant was surety. After the notes were due, Peabody & Co. suspended payment, and entered into a written agreement with their creditors, including the plaintiff and the defendant, "that the said Peabody & Co., having failed to meet their full liabilities, hereby offer and agree to pay the sum of 50 per cent. of all the unsecured claims as follows: One-third in four months and two-thirds in twelve months, both from date hereof—provided they are allowed to continue on in their business of lumbering at Gorham during said time of payment. * * * And the said creditors, on the other part, agree to take said sum of 50 per cent. in manner and form as heretofore offered, and at the end of said time of one year to release and discharge all the claims against said company so far as C. S. Peabody & Co. personally are concerned, provided the 50 per cent. is fully paid as offered and agreed." The plaintiff and defendant were present, and acted at a meeting for arranging a plan of compromise, and subsequently signed the agreement.

The first payment of the 50 per cent. provided for was made, after which Peabody & Co. went into bankruptcy. The plaintiff claimed that the defendant, by signing the agreement, was estopped from denying that he assented to the plaintiff's agreement to extend the time of payment of the notes, and requested that a verdict be ordered, and, on refusal, requested an instruction according to his claim, which was also refused. The question of the defendant's assent to the extension of time of payment was submitted to the jury, and the plaintiff excepted.

ALLEN, J. The agreement for a compromise between Peabody & Co. and their creditors, signed by the plaintiff, extended the time of payment of the plaintiff's notes, and, being on a good consideration, released the defendant from further liability as surety, unless he consented to the agreement (Crosby v. Wyatt, 10 N. H. 318, 324; Watriss v. Pierce, 32 N. H. 560), or unless, as a part of the agreement, his liability was reserved (Viele v. Hoag, 24 Vt. 46; Blackstone Bank v. Hill, 10 Pick. [Mass.] 129; 1 Par. N. & B. 241). The defendant signed the agreement, and assented to all there was in it. He assented that all creditors signing the agreement should receive, at a future day

[22] Accord: Big Rapids Nat. Bank v. Peters, 120 Mich. 518, 79 N. W. 891 (1899). See cases cited in 2 Ames, Cases on Bills and Notes, p. 120, note 2.

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named, 50 per cent. of their debts in full discharge. In assenting to this, he assented to the plaintiff's making the same agreement. He not only assented to the extension of time of payment agreed to by the plaintiff, but he also assented to a reservation of his own liability as surety, by signing the instrument which provided that the claims of creditors against Peabody & Co., so far as they were personally concerned, should be released on the payment of the 50 per cent. The limitation of the agreement to claims against the debtors "personally" was an exclusion of the plaintiff's claim against the defendant as surety, and saved his liability.

The agreement for a compromise being in writing, its construction, meaning, object, and effect devolved on the court to determine, and were not within the province of the jury. No question of fraud being suggested, and there being no ambiguity in the terms of the instrument, it could not be varied or controlled by parol evidence of the intention or understanding of the parties to it. It being plain that one effect of the agreement was to extend the time of paying the plaintiff's notes, and that the defendant assented to this by signing the paper, he could not afterwards be heard to say that he did not assent to it. No question being made of the defendant's signing the paper, nor of fraud, and the evidence being conclusive of the defendant's assent to whatever the plaintiff did, either in extending the time of payment or in any way varying the original contract, there was nothing, as the case shows, from which the defendant's discharge from liability as a surety could be inferred. The plaintiff was entitled to his request for a verdict for the amount due on the notes.

Exceptions sustained.

STANLEY, J., did not sit. The others concurred.[23]

SECTION 2.—SURRENDER OF COLLATERAL

HOLLAND et al. v. JOHNSON.

(Supreme Court of Indiana, 1875. 51 Ind. 346.)

PETTIT, J. This suit was prosecuted by the appellants, William A. Holland and John Holland, against the appellee, David Johnson, on a promissory note, copied below; it being joint and several, and the Allens having been adjudged bankrupts before the suit was brought:

"Six months after date, we or either of us promise to pay William A. and John Holland six hundred and forty-five dollars and thirty-three

[23] Accord: Osgood v. Miller, 67 Me. 174 (1877); Johnson v. Prater, 84 Ga. 141, 10 S. E. 589 (1889).

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cents, for value received, collectible without any relief from valuation or appraisement laws, with ten per cent. interest from date until paid.

"February 8th, 1873. Riley Allen.
"Hiram Allen.
"David Johnson."

The complaint was answered in eight paragraphs, and the first error assigned and complained of is the overruling of a demurrer to the first, second, third and fourth paragraphs of the answer. The first paragraph of the answer was this:

"(1) The defendant herein says that he executed the note mentioned in plaintiff's complaint, but that he executed it as surety, which fact at that time was known to plaintiffs, of Hiram Allen and Riley Allen, who also signed said note; that said note was secured by a mortgage, a copy of which is filed herewith and made a part hereof, made by said Riley Allen and Hiram Allen, on the 18th day of February, 1873, and on that day taken and accepted by plaintiffs; that said land, so conveyed, was at that time, and still is, of the cash value of three thousand dollars, which was sufficient to secure the note in plaintiffs' complaint mentioned and another promissory note mentioned in said mortgage; that on the 5th day of May, 1873, the plaintiffs, without the knowledge or consent of the defendant, and contrary to his wishes, and for a valuable consideration, released said mortgage, in consideration of a new mortgage from said Allens and their respective wives on the land mentioned in said mortgage, dated February 18, 1873, extended the time of payment of the note set out in plaintiffs' complaint for a length of time beyond when the same would fall due, to wit, for the space of six months, and agreed to, and did then and there, bind themselves to give said Allens longer time for the payment of said note; that in consideration of said promise and agreement by plaintiffs, said Allens did then and there, together with their said wives, execute and deliver to said plaintiffs said new mortgage, which is filed herewith by copy. Wherefore this defendant says that he is released from all liability on said note. He therefore asks for judgment for his costs herein, and for all proper relief."

The second paragraph of the answer sets up the substantial facts of the first, and, in addition, alleges that the interest of the wives of the Allens in the lands mortgaged on the 5th day of May, 1873, was of the cash value of two thousand dollars, and that the plaintiffs, without the knowledge or consent of the defendant, canceled and released, on the 5th day of September, 1873, the mortgage of the 5th day of May, 1873.

The third paragraph is substantially the same as the first, with the addition that the plaintiffs extended the time of payment of the note to the Allens six months, in consideration of their making the mortgage of February 18, 1873.

The fourth paragraph sets up a parol release and surrender of the mortgage of the 18th of February, 1873.

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A majority of the court hold all of these paragraphs of the answer good, as well those which make the mortgages a part of them as those which do not do so, and that the mortgages were not the foundation of the defense set up in them, and that a parol release is valid in such a case as this, and that these views are sustained by the following authorities:

As to the failure to file the mortgages or a copy of them with the paragraphs in which they are set up, Heitman v. Schnek, 40 Ind. 93.

As to parol release, Mauzey v. Bowen, 8 Ind. 193, and notes 1 and 2; Knarr v. Conaway, 42 Ind. 260; Ackla v. Ackla, 6 Pa. 228, and cases there cited.

In these views the writer does not concur. He thinks that the mortgages were the foundation of the defense, and that, under our statute, the original or a copy should have been filed with each paragraph of the answer, and that a parol release of a mortgage, in such a case as this, is not valid.

It is urged by the counsel for the appellants that the release of securities given by the principals, Allens, to the payees, Hollands, after the note was made and signed by Johnson as surety, cannot release Johnson as such surety.

We hold the reverse of this position. It is the duty of the payee of a note, on which there is a surety, to hold all securities which he has from the principal in the note, whether the securities existed at the date of the note or were given afterwards; and if he releases such securities, the surety on the note will be released to the extent of the value of the security which has been released by the payee. Stewart v. Davis' Ex'r, 18 Ind. 74; Story, Eq. Jur. §§ 325, 326; 2 Am. L. Cases, 345 et seq.

We think and hold that there was no error in refusing to allow the plaintiff to take a non-suit after the jury had retired and before they had returned with their verdict. 2 Gav. & H. Rev. St. 1870, p. 216, § 363.

The only remaining questions are as to the sufficiency of the evidence and the correctness of the instructions given.

The evidence clearly tends to prove the allegations of the pleadings, and the instructions are clearly within and confined to the issues joined and the evidence given.

We can find no error in the action of the court below.

The judgment is affirmed, at the costs of the appellants.[24]

[24] Accord: Willis v. Davis, 3 Minn. 17 (Gil. 1) (1859); Cummings v. Little, 45 Me. 183 (1858), sureties held to be discharged in toto, although security not equal to debt, because a joint judgment could not be rendered for different amounts against principal and surety. Cf. Acers v. Curtis, 68 Tex. 423, 4 S. W. 551 (1887), ante, p. 332; obiter, Brown v. First Nat. Bank, 132 Fed. 450, 66 C. C. A. 293 (1904); Mutual Loan, etc., Ass'n v. Sudlow, 28 L. J. Rep. Com. Law (N. S.) 108 (1858), Common Pleas, Mich. (1858).

On the admissibility of the parol evidence, see cases under Chapter VIII, section 1, ante.

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BINGHAM, Respondent, v. MEARS et al., Appellants.

(Supreme Court of North Dakota, 1894. 4 N. D. 437, 61 N. W. 808, 27 L. R. A. 257.)

CORLISS, J.[25] The defendants were sureties on an undertaking given on appeal to this court from a judgment. Their only defense to this action against them on the undertaking is that the principal on whose behalf they signed the undertaking assigned to the plaintiff, as collateral to the claim on which such judgment was rendered, certain promissory notes secured by real estate mortgages, and that such collateral security is sufficient to pay such judgment and all expenses; that they have notified the plaintiff that he must resort to such collateral to collect his claim, but that he has failed to do so.

Under the circumstances of this case, these facts do not constitute a defense. The general rule is that the surety has no right to insist that the creditor shall first proceed against the principal debtor, or any security which such debtor may have given him. Upon default the surety may at once be sued. 1 Brandt, Suretyship, § 97. It is true that, in cases characterized by exceptional features, equity may compel the creditor to resort first to the property of the principal debtor where this will occasion no inconvenience or delay to the creditor. See Railroad Co. v. Little, 41 N. J. Eq. 519, 7 Atl. 356. But the facts of this litigation do not call for the application of this rule. There is no claim that the principal debtor is insolvent, or that these collateral securities will not be available to the sureties in their hands for their indemnity after they have become by payment subrogated to all rights of the plaintiff therein.

There is also another rule which appears to be well supported, but this case is not brought within its scope. There is authority for the doctrine that, upon indemnifying the creditor against the expenses of the proceedings, the surety may, in equity, compel him to first exhaust his remedies against the principal debtor. Brandt, Suretyship, § 238. But in this case no offer of indemnity appears to have been made. This is a simple action at law upon a contract. The right of the sureties with respect to this collateral security is to resort to it themselves on paying the debt, and not to compel the creditor to resort to it. It is because of this right of a surety to look to such security for indemnity after he has paid the debt that the release of such security by the creditor will discharge the surety. When the surety is sued, he cannot, in an ordinary case, at least, defend on the ground that the principal should have been first sued, and all efforts to collect the debt from him exhausted. On the same principle, the surety cannot insist that the creditor must first essay to collect his claim out of the collaterals the principal debtor has given him, except in the case mentioned in section 4310. This statute is inapplicable to this action.

[25] The arguments of counsel and a part of the opinion are omitted.

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Another section of our statutes clearly contemplates that the mere failure, after request, to sue the principal debtor, or to proceed against collateral security, will not defeat an action against the surety. The latter may nevertheless be sued, and is liable for every dollar of the debt, except to the extent that he is prejudiced by the refusal of the creditor to proceed as requested. Comp. Laws, § 4305. The fact that the principal debtor has not been sued, or that collateral security has not been exhausted is never a defense of itself. It is not a defense, even when a request of the surety is shown that the creditor sue the principal or resort to his collateral, unless the surety is prejudiced by the failure of the creditor to act as requested, and then only to the extent of such prejudice. To have made out a defense because of the failure to resort to this collateral security, defendants should have proved that they had been prejudiced thereby.

Another section of our statute leads us to the same conclusion. Section 4310, Comp. Laws, provides that, "whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." Here is a single instance in which the surety may insist that collateral held by the creditor shall be first exhausted. It follows that in no other case does this right exist, unless the right was well established under the decision prior to the enactment of this statutory law. So far from finding such a rule to have been settled at the time our Code was adopted, we have been unable to discover a single authority sustaining such a doctrine, where the facts were not exceptional. All the adjudications support the contrary rule. Fuller v. Loring, 42 Me. 481; Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Morrison v. Bank, 65 N. H. 253, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. Rep. 39; Abercrombie v. Knox, 3 Ala. 728, 37 Am. Dec. 721; Allen v. Woodard, 125 Mass. 400, 28 Am. Rep. 250; Jones v. Tincher, 15 Ind. 308, 77 Am. Dec. 92; Freehold Nat. Bkg. Co. v. Brick, 37 N. J. Law, 307; 1 Brandt, Suretyship, §§ 97, 237; Buck v. Sanders, 1 Dana (Ky.) 187; Day v. Elmore, 4 Wis. 190–198; Penn v. Ingles, 82 Va. 65; Davis v. Patrick, 6 C. C. A. 632, 57 Fed. 909; Callahan v. Mitchell, 29 Ind. 419; Aultman v. Smith, 52 Mo. App. 351.

The judgment of the district court is affirmed. All concur.[26]

[26] The opinion on the rehearing is omitted.

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MONROE et al. v. WILLIAM H. DE FOREST et al.

(Court of Chancery of New Jersey, 1895. 53 N. J. Eq. 264, 31 Atl. 773.)

On exceptions to master's report.

BIRD, V. C. Dix & Phyfe claim to be creditors of the deceased testatrix. They hold a promissory note, which was drawn by William H. De Forest, Jr., to the order of William H. De Forest, Sr., and indorsed by the latter, and also indorsed by the deceased testatrix, who was the wife of the first indorser. At the time of the execution of the note a bond was given by the maker of the note in the sum of $60,000, for the payment of $30,000, with interest, which bond was secured by a mortgage on certain lots on One Hundred and Forty-Fourth street and on Seventy-Sixth street, New York City. At the same time an agreement was entered into between Dix & Phyfe and the maker of the note, which concluded with the stipulation in these words:

"The parties of the second part agree that the said mortgage of thirty thousand dollars on the premises on the south side of One Hundred and Forty-Fourth street shall be subordinate and subject to the second mortgage of eighty thousand dollars, and shall be withheld from record for the period of ten months, which is the time provided for the completion of said buildings, provided the party of the first part shall faithfully perform his covenants under this agreement. And the parties of the second part agree to release from time to time any of the houses so to be completed from the lien of said mortgage on the payment to them of the sum of twenty-five hundred dollars on such house."

The maker of the note and the owner of the lots commenced the erection of buildings thereon, and after the walls were erected applications were made from time to time by builders or materialmen to Dix & Phyfe for the release of their lien to the extent of the labor and material employed in and upon the said buildings, which was granted by them without any payment whatsoever.

It is insisted that this release, without compensation, according to the agreement, works a discharge of the surety. I can find no case or rule of law which will permit me to hold otherwise. It is well settled that a surety is entitled to the benefit of all collaterals which have been taken by the creditor from the principal debtor. In this case, Dix & Phyfe not only had the mortgage referred to, but entered into an agreement in and by which they would release the mortgage from each of the various lots upon the payment of $2,500. It is insisted that this mortgage turned out to be of no value, and that therefore the surety is not damaged by the release. I very much doubt, under such a stipulation, if an agreement to the effect can be of any avail, especially where the testimony respecting the value of the premises at the time of the release shed so little light upon the question of value. Besides

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this, the release evidently worked such a change of condition as to make it impossible to determine what the result would have been if such conditions had not been imposed. Who can tell but that the embarrassments which the mortgage presented would not have been overcome by the owner, had the mortgagee refused to be subservient to his wishes in surrendering his position as such mortgagee?

But the material point in the case is the absolute agreement that the mortgage is to stand until the payment of the $2,500. It is that agreement which the surety is entitled to, as well as any benefit that may accrue from the value of the mortgaged premises. The lien of the mortgage may have been embarrassing; but relief against such embarrassment devolved upon the mortgagor or owner of the premises, and not upon the mortgagee in the face of the agreement. The surety had an undoubted right in any and every event to expect that mortgage to stand in the place by way of seniority, which it held until $2,500 was paid upon each lot.

This transaction comes directly within the judgment pronounced by Lord Loughborough, in Reese v. Berrington, 2 Ves. Jr. 540, also 2 White & T. Lead. Cas. 1870: "It only amounts to this: That there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." 2 White & T. Lead. Cas. 1894, 1901; Harr. Sub. § 19; Pearl v. Deacon, 1 De G. & J. *461, 2 Am. Lead. Cas. 394; Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; Vose v. Florida Railroad Co., 50 N. Y. 374, 375; De Coly. Guar. 388, 389; Miller v. Stewart, 9 Wheat. 680, 6 L. Ed. 189; 1 Story Eq. Jur. §§ 324, 325; Price v. Truesdale, 28 N. J. Eq. 200; Philadelphia & Reading Railroad Co. v. Little, 41 N. J. Eq. 520, 7 Atl. 356; Freehold National Bank v. Brick, 37 N. J. Law, 307.

The surety, upon discharging the debt, is always entitled to all the securities which the creditor had taken for his own protection in the same condition as the creditor received them. Pledge v. Buss, Johns. (Eng. Ch.) 663; 2 White & T. Lead. Cas. 1888, 1891; Vose v. Florida Railroad Co., supra; New Hampshire Savings Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685; Guild v. Butler, 127 Mass. 386; Paulin v. Kaighn, 29 N. J. Law, 480.

In such cases the law presumes injury to the surety until the contrary is established, the burden of which is upon the creditor. 2 White & T. Lead. Cas. 1902.

When this agreement is read and considered, it will be seen that the bond and mortgage referred to were to give way for other securi-

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ties therein named, and were in reality to be postponed to such a period of time as would enable the debtor and owner to complete the buildings upon the lands mentioned. For this he was allowed ten months, by which it was manifestly intended to give him every opportunity to provide for every embarrassment. In the light of the above authorities, the creditor had no right to interfere with or to alter these conditions without the consent of the surety.

But it is claimed that the result above expressed is not the just result in this particular case, because William H. De Forest, Sr., the executor of the surety, consented to, if he did not request, the execution of the releases by Dix & Phyfe, after he had proved the will and taken upon himself the burden of the execution thereof. I find nothing in the case that justifies the executor in giving the least countenance to such release.[27] * * *

However, it is pressed upon the attention of the court that the real estate so mortgaged as security for the payment of the $30,000 was absolutely worthless for any such purpose, and that consequently no injury was done to the estate of the testatrix, or, in other words, that consent to such release by the executor did not increase in any wise the liability of the estate. This conclusion has no foundation to rest upon under the circumstances of the case. And, what is more to be regretted, it is impossible, as was said by Lord Chief Justice Knight Bruce, in Wiles v. Gresham, 5 De G., M. & G. 773, now to determine that question. Indeed, that question could only have been satisfactorily settled by the ordinary or natural progress of events, in the just prosecution of the right of all parties interested in the premises. From this statement it will be perceived that the point to be determined is, not the value of the premises at any particular time, but whether William H. De Forest, Jr., or any one in his stead, would have carried out the implied promises and agreement entered into with Dix & Phyfe, and paid the $2,500 in discharge of their mortgage to that extent, in case no release had been executed. This was his undertaking. Upon the strength of this undertaking the transaction was completed, not only as to Dix & Phyfe, but as to Mrs. De Forest, the surety.

When this transaction in all its details was carried through, the prospective value of the property must have been considered; but, whether it was or not, the expressed condition was that upon the execution of a release $2,500 should be paid. The value of the property had nothing whatever to do with this condition, and, as was clearly and forcibly intimated in the case of Wiles v. Gresham, supra, none can say that if the release had not been executed the mortgagor or owner of the premises would not have raised the $2,500. It was not only his contract that he would, but his highest interest to do so. The buildings were partially erected. It would be absurd for the court to as-

[27] The opinion is here abridged by omitting the further discussion of the executor's lack of authority to sanction the release.

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sume that it was impossible for the owner to raise the $2,500 upon each lot. It was incumbent upon him to raise the money or submit to the sacrifice of all that he had already invested, the former of which is clearly much more probable than the latter.

The foregoing conclusions seem to be quite in harmony with the authorities, which hold that an executor or administrator cannot bind the estate which he is administering by any new promise. Sumner v. Williams, 8 Mass. 162, 5 Am. Dec. 83; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Pinney v. Johnson, 8 Wend. (N. Y.) 500; Austin v. Monroe et al., 47 N. Y. 360; McFarlin v. Stinson et al., 56 Ga. 396.

An executor cannot, by his promise as such, bind the assets in his hands, nor can he consent to their diminution or surrender without a reasonable consideration therefor, or until all the conditions of the obligation be complied with. The estate being insolvent, the creditors have a right to be heard.

I think the exception to the master's report in this respect should be sustained, with costs.

NORTH AVE. SAVINGS BANK v. HAYES.

(Supreme Judicial Court of Massachusetts, 1905. 188 Mass. 135, 74 N. E. 311.)

Contract, by a savings bank against a surety and joint promisor upon a promissory note held by the plaintiff. Writ dated November 11, 1901.

In the superior court the case was presented upon an agreed statement of facts. That court gave judgment for the plaintiff in the sum of $2,928.39, and the defendant appealed.

The note sued upon was as follows:

"$2,500.00 Cambridge, Dec. 10, 1895.

"For value received, we, Cornelius Dorr, as principal, and Cornelius Dorr & Son and Herbert W. Hayes, as sureties, jointly and severally promise to pay to the North Avenue Savings Bank, or order, the sum of twenty-five hundred dollars, on demand, at the office of said Savings Bank, in Cambridge, with interest at the rate of six per cent. per annum, payable semi-annually, on the tenth day of January and the tenth day of July in every year, so long as the said principal sum or any part thereof shall remain unpaid.

"Cornelius Dorr.
"Cornelius Dorr & Son.
"H. W. Hayes.

"Signed in the presence of Milton L. Walton.

"Secured by note of A. W. Rucker for $2,500."

On December 10, 1895, Cornelius Dorr borrowed from the plaintiff $2,500, for which he gave the above note in compliance with the

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provisions of Pub. St. 1882, c. 116, § 20, cl. 6. The plaintiff for its further protection also took from the firm of Cornelius Dorr & Son the promissory note of A. W. Rucker, referred to by the above memorandum on the face of the note, dated on or about December 1, 1895, for $2,500, payable in one year to the order of C. Dorr & Son, and by them indorsed generally.

On the maturity of the note of A. W. Rucker held by the plaintiff it was not paid, and Rucker in place thereof executed a renewal note for the same amount, dated December 1, 1896, payable in six months after date to the same firm of C. Dorr & Son, which renewal note was indorsed generally by the firm, and then was delivered to the plaintiff, which surrendered in exchange the Rucker note then overdue and unpaid. The defendant was ignorant of and did not consent to the exchange.

The Rucker renewal note was not paid at maturity, and thereafter the plaintiff caused an action to be brought on it, and obtained judgment, whereon it collected the sum of $700 from Rucker. This sum the plaintiff received on July 21, 1902, and on that date credited it as paid on the note now in suit. Cornelius Dorr failed to pay the note in suit on demand at maturity, and the note has remained unpaid, except to the amount of $700 collected on the Rucker note.

It was agreed that if, on the facts stated, the plaintiff was entitled to recover, judgment might be entered for the plaintiff in the sum of $1,800, with interest on the sum of $2,500 at the rate of 6 per cent. per annum from January 10, 1897, to July 21, 1902, and interest on $1,800 at the same rate from January 21, 1902, to the date of judgment. If the obligation of the defendant on the note in suit was discharged by any of the acts of the plaintiff, judgment was to be entered for the defendant.

BRALEY, J. If the defendant as one of the makers of the note was jointly and severally liable for its payment, yet it was open to him by way of defense to prove that between the debtors themselves he was a surety, and, as this relation fully appears in the body of the instrument, the plaintiff was charged with notice of the fact. Fitchburg Savings Bank v. Torrey, 134 Mass. 239.

The note is in the ordinary form, without any recitals to show that its payment was secured, and when it was delivered originally there does not appear to have been any agreement to which the defendant was a party that security was to be given for its payment. As the pledge made by the co-surety was either voluntary, or at least without any understanding with the defendant, the course pursued subsequently by the plaintiff in dealing with the collateral cannot be treated as an alteration of the original contract which in itself operated to discharge him. Cambridge Savings Bank v. Hyde, 131 Mass. 77, 79, 41 Am. Rep. 193; Sanderson v. Aston, L. R. 6 Exchq. 73.

By virtue of his suretyship, and not because of his contract, upon paying the note he would have been subrogated to the rights of the

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plaintiff in any securities pledged to secure its payment, though, as in this case, furnished by a co-surety. Guild v. Butler, 127 Mass. 386; Duncan, Fox & Co. v. North and South Wales Bank, 6 App. Cas. 1, 19.

But as the equitable right on which this defense rests either at law or in equity is that a surety shall not lose the benefit of any security held by the creditor if at any time he chooses to pay the debt, this indemnity does not extend beyond the actual damage he may be found to have suffered. Worcester Savings Bank v. Thayer, 136 Mass. 459, 462; Boston Penny Savings Bank v. Bradford, 181 Mass. 199, 63 N. E. 427.

If the plaintiff, without his consent, surrendered such security, or permitted it to be lost or impaired in value, the defendant would be discharged to the extent of any financial loss he thus is shown to have suffered. Beacon Trust Co. v. Robbins, 173 Mass. 261, 272, 53 N. E. 868. The only fact upon which the defendant relies as working his discharge is that without his knowledge or assent a promissory note of the face value of the principal debt, and held as collateral security for its payment, not having been paid at maturity, was surrendered by the plaintiff with the assent of the co-surety, who was the payee and pledgor, and a renewal note for a similar amount taken in substitution.

Beyond the mere recital of the taking of one note in place of the other, the agreed facts contain no statement upon which this defense can be put.

This is significant, for before the defendant can be exonerated from making payment according to his promise it must be made apparent that by the conduct of the plaintiff in accepting the substitution he suffered an actual, and not a speculative, injury. Coates v. Coates, 33 Beav. 249; State Bank of Lock Haven v. Smith, 155 N. Y. 185, 49 N. E. 680.

It is not stated that the exchange was made otherwise than in good faith, or that at the time it was not a prudent arrangement entered into for the benefit of all parties in interest.

Neither is it shown that the acceptance of one note for the other resulted in any wrong to the defendant, for the value of the collateral held in either form depended upon the ability of the maker to meet his obligation.

If the original note had been retained, it does not appear that it would have been paid within the time covered by the note taken in renewal, or that during that time the solvency of the maker had become impaired, although later, upon suit being brought, only a portion of the note was collected.

By reason of the absence of any affirmative proof that the plaintiff's action deprived him of a benefit that might have arisen if the collateral note had been retained, the defendant fails upon the agreed facts, under which the case is submitted, to make it manifest that he

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has suffered any monetary loss, and consequently he is not released. Coleman v. Lewis, 183 Mass. 485, 67 N. E. 603, 68 L. R. A. 482, 97 Am. St. Rep. 450; State Bank of Lock Haven v. Smith, ubi supra; Eaton v. Waite, 66 Me. 221; Bull v. Coe, 77 Cal. 54, 62, 18 Pac. 808, 11 Am. St. Rep. 235; Merchants' Ins. Co. v. Herber, 68 Minn. 420, 428, 71 N. W. 624.

Judgment affirmed.[28]

NATIONAL LEAD CO. v. MONTPELIER HARDWARE CO. et al.

(Supreme Court of Vermont, 1901. 73 Vt. 119, 50 Atl. 809.)

Assumpsit on a note. Plea, the general issue. Trial by court, Washington County, March Term, 1900, Tyler, J., presiding. On facts found, judgment was rendered against the defendants D. L. Fuller and H. L. Dean, named in the opinion. The defendant D. L. Fuller excepted.

The note in suit was one signed by all the defendants and was as follows:

"$873.82. Jan. 9, 1897.

"Two months after date we promise to pay to the order of National Lead Company eight hundred and seventy-three and $^{82}/_{100}$ dollars, at Montpelier, Vt. Value received."

The consideration passed to the first signer, the Montpelier Hardware Company. At some time after the note was given the Hardware Company went into insolvency under the insolvent law of this state. The plaintiff presented the note against the insolvent estate and received therefrom 70 per cent. of the claim in dividends. The court found that there was a reasonable probability that another small dividend would be paid. The amount of damages for which judgment was rendered was the balance due upon the note after deducting the dividends paid.

TAFT, C. J. The plaintiff seeks to recover the amount due upon a promissory note signed by the Montpelier Hardware Company, the defendants D. L. Fuller, H. L. Dean, and one Charles H. Fuller. The latter had been discharged by the court of insolvency. The principal upon the note, the Hardware Company, is in insolvency, and two dividends, amounting to 70 per cent. upon the dollar, have been paid by the assignee. No claim is made against C. H. Fuller. The plaintiff is entitled to a judgment against the defendants D. L. Fuller and Dean.

The defendant D. L. Fuller claimed on the trial below that the plaintiff was not entitled to judgment in this suit, for that it was bound to exhaust its remedy against the principal of the note, and that there

[28] Accord: Vose v. Florida R. R. Co., 50 N. Y. 369 (1872).

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was a reasonable probability of another dividend being realized from the uncollected assets of the Hardware Company, and that it could not proceed against the defendant D. L. Fuller until the insolvent estate was fully settled. This position is not tenable. The plaintiff has the right to collect the note in any legal way from any of the signers. The presentation of the note against the estate of the Hardware Company did not operate to discharge the other signers of the note. The note being a joint one, the plaintiff could not maintain an action against the signers severally, and they were all summoned as defendants. No judgment could be rendered against Charles H. Fuller, as he had been discharged from the claim by the court of insolvency. Judgment was rendered against the two defendants, D. L. Fuller and Dean. If it was error not to include the Hardware Company in the judgment as debtors, that question is not before us, as no exception was taken upon the ground that the Hardware Company were not included in the judgment.

The only questions made below by D. L. Fuller were those above mentioned, viz.: That the plaintiff was bound to exhaust its remedy against the Hardware Company, and could not proceed against him until the estate of the Hardware Company was settled; and that the presentation of the note against the estate of the Hardware Company discharged the defendants D. L. Fuller and Dean. The court below was correct in its rulings on these two questions.

No discharge is granted a corporation by the insolvent court, and there is no provision for staying judgment against one, as there is against an individual, until the question of a discharge is settled. Whether judgment against the Hardware Company could properly have been rendered we do not decide, as the question is not before us.

There was no error in rendering judgment against D. L. Fuller and Dean, and the same is affirmed.

EVERLY v. RICE.

(Supreme Court of Pennsylvania, 1853. 20 Pa. 297.)

Error to the District Court of Philadelphia.

This was a scire facias post an. et diem to revive a judgment entered on a bond executed by Martha J. Everly to John P. Rice.

The judgment of Rice was entered to June Term, 1842. On 8th February, 1845, a scire facias post annum et diem, and to revive the judgment, was issued. To this scire facias the defendant pleaded payment, with leave, and gave notice of special matter. See the statement referred to in the opinion of Black, C. J.

Verdict was rendered for plaintiff, and was entered for $889.63.

BLACK, C. J. Miller N. Everly, the son of the plaintiff in error, was indebted to Rice in the sum of $1,000, for which he gave his judg-

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ment bond and a mortgage on certain property in New Jersey. Rice, being advised that Everly's title to the mortgaged premises was worthless, entered judgment on the bond in the district court of Philadelphia, issued execution, and levied on personal property. Mrs. Everly, the present plaintiff, then gave her bond, payable in a year, in consideration that Rice should stay proceedings for that time. He did stay his execution in Philadelphia, but, some time afterwards, filed a bill in New Jersey to foreclose the mortgage. It was answered and resisted, but the foreclosure was decreed. Mrs. Everly then applied to the court of chancery for an injunction to prevent the sale, and this also was finally decided in favor of Rice. It was sold by the sheriff to one Diehl for $150, though Miller N. Everly was present, willing to bid, as agent of his mother, $1,250. This suit is on the mother's bond.

The first question disputed in the district court was whether the bond in suit was given in consideration of an agreement by Rice that all proceedings should be stayed for one year from its date, or merely that the goods then seized should be released from that levy. The defendant below asserted that there was an express contract to the effect that all proceedings on the bond and on the mortgage should be stayed. This was submitted to the jury as a question of fact, and their finding is, of course, not subject to our review. We must take it as being conclusively settled that the object and consideration of the bond were as the plaintiff below alleged. There was, then, no agreement which prevented him from proceeding on the mortgage for a year, and the proceedings which he did institute were not in violation of any promise.

Another point in the defense was that Rice, by his conduct in conjunction with others at the sheriff's sale, prevented Mrs. Everly from bidding the property up to its value, though she was on the ground, by her agent, offering to do so, and that he designedly (though for what reason it is not easy to conjecture) caused it to be sold to another person at a much less price. If this was true, Mrs. Everly was injured to the extent of the difference between the value of the property (or of the title which she would have got) and the price it sold for. This, also, was submitted to the jury, and apparently found in favor of the plaintiff below.

But the submission of this question to the jury was accompanied with instructions from the court that, if the fact was as the plaintiff alleged it to be, it was a defense only pro tanto, and would not entirely defeat the plaintiff's right to recover on his bond.

When a fraud has been perpetrated in the making of an instrument, the dishonest cannot be separated from the honest parts. It is tainted through and through. But when a bond is originally sound, and the defense rests on matter subsequent, I know of no principle or authority for saying that the party is entitled to anything more than that simple justice which prevents him from suffering by the act of his adversary. He is entitled to be kept and maintained in the same condition he would

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have been in if the act complained of had not been committed, and he is entitled to no more.

A surety may be subrogated to the rights of the creditor in all the securities he has against the principal. Mrs. Everly could demand to be so subrogated, or else to have the mortgaged premises sold for the best price, and the proceeds applied to the payment of the debt in her relief. Concede that the defendant improperly prevented this; how much did she lose? The jury have said that she lost the sum which they deducted from the amount of the plaintiff's claim. She is only required to pay what she would have been out of pocket in any event.

When the creditor has in his hands the means of paying his debt, and he does not use it, but gives it up, the surety is discharged. But the discharge does not extend to the whole debt, if the means of payment was only of part. It is said that this mortgage was security for the whole debt. Whatever it was technically, it was in truth and fact security for as much as it would pay; and to that extent the defendant was allowed for its loss. In cases of this kind, the law deals in facts and disregards fictions.

Of the other assignments of error, it is sufficient to say that they are not sustained.

Judgment affirmed.

SKIP v. HUEY, WILCOX & EDWARDS.

(High Court of Chancery, 1744. 3 Atk. 91.)

The defendants were jointly and severally bound to the plaintiff in the penal sum of £4,000. on the 5th of December, 1739, conditioned for the payment of £2,000. on the 5th of March ensuing, which money came to the hands of Huey and Wilcox, who were the principals in the bond.

Huey comes to the plaintiff, and desires he will take four notes, given by different persons, and payable at future days, in lieu of the bond, and that if he would give up the bond, though the notes should not produce the whole £2,000. and interest, he would see him paid the deficiency, and signed an agreement to this effect in his own name, and in the names of Wilcox and Edwards. Huey likewise gave the plaintiff a draft on Martin the banker.

But Huey, coming to the plaintiff on a Saturday after six o'clock, desired the plaintiff would give him leave to date the draft on Martin of the Monday.

Huey had taken out of Martin's shop all the money due to himself and Wilcox and Edwards on the very same Saturday.

The plaintiff afterwards went to Martin's shop, where he found no money in the name of Huey and Company. And before the notes became due Huey and Wilcox were bankrupts, but Edwards still remains a solvent person.

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The plaintiff, who has received about £500. on the notes (the rest remaining unreceived to this day), brings his bill against Edwards, the co-obligor, for the residue of the principal and interest due on the bond, insisting this was a fraud of Huey's upon him, and that, though he has been drawn in to deliver up the bond, yet he is entitled to be relieved against Edwards as a co-obligor.

The defendant Edwards insisted that he was no party to the agreement between the plaintiff and Huey, and that he ought not to be affected by it; and as the bond is delivered up in consideration of the notes, that it is novated, and this defendant, who is one of the sureties only in the bond, is released, and no longer liable as a surety.†

The LORD CHANCELLOR. I have had some doubt during the course of this cause, but am now fully satisfied that the plaintiff is not entitled to relief.

Mr. Edwards has not been guilty of any fraud.

There are many cases where equity will set up debts extinguished at law against a surety, as well as against a principal; as where a bond is burnt or canceled by accident or mistake, and much stronger if a principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he should not avail himself of the fraud of any of the debtors.

But this is not one of those cases, for the whole transaction was in order to discharge Edwards. Mr. Skip was told so, and Huey informed him that Edwards and he had quarreled about it, and Skip himself asked Edwards how he came to be so pressing to have the bond delivered up, so that he was fully apprised it was solicited at the importunity of Edwards.

Skip was a competent judge of what he should do, and might have declined it, but, instead of that, accepts the notes from Huey, and a draft on Martin, the banker, for the Monday following, which shows the confidence and reliance Skip had in Huey, for it is very unusual to take such a draft.

It is plain from hence that Skip discharged Edwards, for he knew Edwards would not trust Huey any longer.

What is the rule? He who trusts most shall lose most; if Skip had refused, Edwards might have arrested Huey upon the note which he had given Edwards by way of indemnity against the bond.

It is said there is a fraud in part of the case relating to the draft on Martin; perhaps it may be so, but this is not clear; and what has been done by Skip preponderates, and rebuts the fraud; for it was not right in him, after he had delivered up the bond, to make Huey sign such an agreement in the names of Wilcox and Edwards.

What was the original scope and intention of the application, but that the bond might be delivered up, and Edwards absolutely discharged?

† The argument of counsel is omitted.

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Instead of this, what does Skip do? Why he takes a note, and makes Edwards liable by another instrument, and was a plain deceit upon Edwards; whereas the intention was clearly to discharge him, and therefore the bill must be dismissed, but without costs.

WULFF & BILLING v. JAY.

(Court of Queen's Bench, Trinity Term, 1872. L. R. 7 Q. B. 756.)

Declaration: That the defendant on the 25th of August, 1870, by deed covenanted with the plaintiffs that he would on the 25th of August, 1871, pay unto the plaintiffs the sum of £75., or, if required so to do, purchase in the names of the plaintiffs, or the survivor of them, in the books of the Governor and Company of the Bank of England, the sum of £82. 8s. 4d. three per cent. reduced annuities, and would also on the 25th of August in each succeeding year pay the sum of £75., or, if required so to do in manner aforesaid, purchase in the names of the plaintiffs, or the survivor of them, the sum of £82. 8s. 4d. three per cent. reduced annuities; and would also yearly and every year, until the sum of £300. should be fully paid and satisfied, pay unto the plaintiffs' interest on the sum of £300., or on so much thereof as should from time to time remain unpaid, or unpurchased, at and after the rate of £5. per cent. per annum, to be computed from the date of the deed, and that in case default should be made in the payment of the sum of £300. or in the investment of the sum of £329. 13s. 5d. three per cent. reduced annuities, at the times and in the manner mentioned, the defendant would forthwith, after such default should have been made, upon the request of the plaintiffs, repay the plaintiffs the sum of £300., or so much thereof as should be unpaid, or invest the said sum, or the residue thereof then unpaid, in the purchase of £329. 13s. 5d. three per cent. reduced annuities, or so much thereof as should not have been repaid or reinvested. And the defendant did not pay the sum of £75. on the 25th of August, 1871, nor has he paid the interest on the sum of £300. for the year ending the 25th of August, 1871; and although defendant made default in payment of the sum of £75., the first instalment of the sum of £300., and the plaintiffs requested the defendant to repay the £300., yet the defendant has not paid the same, and the £300. and interest from the date of the deed still remains wholly due in arrear and unpaid.

Plea: Upon equitable grounds, that the deed set out in the declaration was made between one Burns of the first part, defendant of the second part, and the plaintiffs of the third part, and by the deed the plant and stock in trade of Burns and his partner Pim were assigned to the plaintiffs as security for the sum of £300., advanced by the plaintiffs to Burns and his partner Pim. And that after the execution of the deed, to wit, on the 6th of August, 1871, a petition for liquida-

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tion was filed in the London bankruptcy court by Burns & Pim; that a trustee to the joint estate of the two petitioners was duly appointed, and that the plant and stock in trade of the petitioners, being the same assigned to the plaintiffs by the deed recited in the declaration, were sold by public auction, of all which premises the plaintiffs had due notice and were well aware, but of all which premises the defendant knew nothing, and received no notice; and that such plant and stock in trade were more than sufficient to cover the sum advanced by the plaintiffs to Burns, and to satisfy the debt, for the payment of which the defendant became surety for Burns, and entered into the covenants set forth in the deed. And that the plaintiffs did not, as it was their duty to do, take possession of the plant and stock in trade, but allowed the same to be taken possession of by the trustee appointed to the joint estate of Burns & Pim, and permitted the same to be sold and applied to the liquidation of the debts of Burns & Pim, other than to secure the payment of which the said plant and stock in trade were assigned the plaintiffs. And that by their conduct in this respect the plaintiffs have exonerated the defendant from the covenants entered into by him in the deed recited in the declaration.

Issue joined.

At the trial, before Quain, J., at the Middlesex sittings after Hilary term, 1872, the following facts were proved: In the month of August, 1870, Messrs. Burns & Pim, who carried on the business of printers in partnership, applied to the plaintiff, Billing, who was an attorney, for a loan of money. Billing agreed to lend them the sum of £300., part of certain trust moneys in the funds, in the name of himself and the plaintiff Wulff; and he stipulated that Burns & Pim should give by way of security a mortgage of the lease of the partnership premises, and of the plant, fixtures, and goods therein, and also that two sureties should join in a guarantee for securing the payment of the mortgage money.

The mortgage deed was dated on the 25th of August, 1870, and was made between Burns & Pim, thereinafter called the mortgagors, of the first part, the defendant, thereinafter called the surety, of the second part, and the plaintiffs, thereinafter called the mortgagees, of the third part, and after reciting that the plaintiffs had sold the sum of £329. 13s. 5d. three per cent. reduced annuities, standing in their joint names, which had produced the sum of £300., and that the repayment of that sum, or the repurchase of the sum of £329. 13s. 5d., should be secured, the deed assigned to the plaintiffs the partnership premises, consisting of a workshop, for the residue of a term of 21 years, and also assigned the plant, trade fixtures, goods, chattels, and things upon the premises, subject to a proviso for redemption if the mortgagors should pay to the mortgagees on the 25th of August, 1871, the sum of £75., part of the £300., or, if required so to do by the mortgagees, purchase in the name of the mortgagors the sum of £82. 8s. 4d. three per cent. reduced annuities, and also on the 25th of August in each succeeding year, pay £75. or purchase the sum of £82. 8s. 4d. three per cent. re-

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duced annuities; and also, if the mortgagees should pay interest on the sum of £300., or on so much thereof as should for the time being remain unpaid or unrepurchased, after the rate of £5. per cent. per annum by equal half-yearly payments on the 25th of February and the 25th of August of every year; and until default should be made by the mortgagors in the payment or investment as mentioned, the mortgagors should remain in possession and receipt of the rents, profits, etc., of the workshop, plant, fixtures, and things. The deed contained a power of sale on default being made in the repayment of investment of the principal sum, or in the non-payment of the interest, provided that one calendar month's notice in writing be given to the mortgagees requiring payment before exercising the power of sale. The deed contained covenants by the mortgagors and the surety to pay the principal and interest according to the agreement of the parties.

The first half year's interest became due on the 25th of February, 1871, and was not paid. Shortly afterwards the mortgagors became embarrassed, and on the 5th of August, 1871, filed a petition for liquidation, in the London court of bankruptcy, and were adjudged bankrupts on the 20th of August; one Venn, a partner of the plaintiff Billing, acting for the mortgagees in the bankruptcy proceedings. Their insolvency, prior to the bankruptcy, was, a week before the petition was filed, well known to the plaintiff Billing, to whom they were otherwise indebted. The deed of assignment was not registered under 17 & 18 Vict. c. 36, and the trustee appointed by the court of bankruptcy took possession of the plant, fixtures, and things, which were afterwards sold for the benefit of creditors, and realized £300.

On these facts a verdict was by consent entered for the plaintiffs for £340., leave being reserved to enter the verdict for the defendant, the court having power to draw inferences of fact.

A rule was afterwards obtained to enter a verdict for the defendant, or to reduce the damages to such sum as the court should direct, upon the grounds that on the facts proved the defendant had an equitable defense to the action, and as surety was discharged as to the whole or part of the claim, that the equitable plea was proved, and that the plaintiffs were guilty of such laches and conduct as would in equity discharge him as surety.[29]

Cockburn, C. J. This is an action brought against the defendant, as surety. It appears that, as part of the transaction between the principal creditors and the debtors, there was to be a mortgage of the plant, trade fixtures and things upon the debtors' premises, by bill of sale, as security for the principal debt. The debtors were to remain in possession of the things thus mortgaged until default, and the creditors were to have power, in the event of a default in the payment of the

[29] The arguments of counsel and the concurring opinions by Hannen and Quain, JJ., are omitted.

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instalments of the debt which were to be paid under the bill of sale, or in the event of the interest which was to accrue from time to time, not being paid, to enter and sell the things thus assigned upon giving a month's notice.

Now, it appears that in the month of February interest first became due, and that interest was not paid, and it remained unpaid until the month of August, when the debtors became bankrupt. It further appears that the insolvent condition of the debtors' affairs was plain, and that bankruptcy was imminent, and had been impending for some time before it actually took place; and it further appears that one of the creditors was cognizant of that fact, and was afterwards, when the bankruptcy took place, solicitor to the proceedings in bankruptcy. He was therefore perfectly aware of the bankruptcy being imminent. Notwithstanding he took no steps either to protect the bill of sale by registration, or to enter and take possession of the effects.

Now, I think there was a twofold laches on the plaintiffs' part—laches in the first place in not registering the bill of sale. If they had registered it, the effect would have been that the fixtures would have been protected. That would not have applied to the other movables which, remaining in the order and disposition of the bankrupt, would have been affected by the bankruptcy. But then there was laches, if possible, of a more serious description, affecting not only the movables, but the fixtures also. The plaintiffs might have entered and taken possession upon the interest not being paid at the time when it became due. Instead of doing this, however, they allow the mortgagors to remain in possession when they see that bankruptcy is impending and imminent. I cannot doubt myself that their intention was that, being creditors ultra the amount thus secured, the goods in question should be available as assets under the bankruptcy, while they had the security of the defendant to come upon in order to get paid the debt of £300. secured by the bill of sale. I think, looking at all the circumstances, it is impossible to say that the plaintiffs did what they ought to have done to realize the security they possessed. Cases have been cited and authorities have been referred to in Story's Equity Jurisprudence, which abundantly establish that which is a common and well-known proposition, that where a debt is secured by a surety it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay.

That is now a well-known proposition. Here, by registering the bill of sale, and by afterwards availing themselves of the power which they possessed to take possession, the plaintiffs might have secured the payment of the debt to themselves, or by protecting the securities and

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holding them in their hands they could have made them over to the surety when the surety was willing, or was called on, to pay; but by omitting to do what was necessary in order to place themselves in that position, and by allowing bankruptcy to supervene so as to enable the trustee under the bankruptcy to take possession of these goods adversely, it is clear that they have placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the general doctrine, a remedy. I think the creditors have clearly been guilty of laches in not protecting themselves, and in not availing themselves of these securities. Then it is said, granted that at the end of the time when the interest had accrued the surety was liable both for principal and interest, and the principal and interest together amounted to £307. 10s., although the surety is entitled to say to the creditors, "I am entitled either to have such security as you have made available for this debt, or I am entitled to set off the amount against what I owe you under my agreement to indemnify you against loss in respect of this debt," yet he can only say it to the extent of the value of the security itself.

Now, it appears that these goods which the creditors might have taken possession of and made available for the payment of the debt, or to which they might have given the surety a title in order that the surety might recoup himself the amount of his debt, were of the value of £300. They sold for £300. That is exactly the amount of the original principal debt, and there is nothing to satisfy us that they did not realize their value. I do not find anything leading to any other conclusion than that the goods did in fact sell for what they were really worth. We must take it, therefore, that all that was realized was £300. Now, interest having accrued, the debt was £307. 10s., and in respect of the odd money the plaintiffs must have their verdict. There will, therefore, be a verdict for the plaintiffs for £7. 10s.

Rule absolute to reduce the damages accordingly.

BOARD OF COM'RS OF MORGAN COUNTY v. BRANHAM et al.

(Circuit Court of the United States, District of Indiana, 1893. 57 Fed. 179.)

At Law. Action on a bond by the board of county commissioners of Morgan county, Ohio, against George F. Branham and Enos Hege, principals, and William G. Wasson and Henry C. Adams, sureties. Heard on demurrer by Wasson and Adams to the complaint. Demurrer sustained.

BAKER, District Judge. This is an action on a bond executed by Branham and Hege, as principals, and Wasson and Adams, as sureties, to the board of county commissioners of Morgan county, Ohio. The

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sureties, Wasson and Adams, demur to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action against them.

The facts disclosed by the complaint, so far as material to the determination of the question raised by the demurrer, are as follows:

A contract in writing was entered into between the plaintiff, as party of the first part, and Branham and Hege, as party of the second part, by the terms of which the latter agreed to furnish the material and do the work specified therein. The part of the contract having reference to the payments for the work is as follows: "Payment for said work is to be made as follows, to wit: When said work shall have been, in opinion of party of first part, half completed, said party of first part, or its engineer, shall carefully estimate the work completed, and pay the party of the second part a sum of money equal to 85% of the cost of the completed work, as agreed upon therein: Provided said sum shall not exceed the amount of $7,480. And on the completion of the entire work, and its acceptance by party of the first part, then full and complete payment, as herein provided for, shall be made to party of the second part."

Branham and Hege, as principals, and Wasson and Adams, as sureties, executed to the plaintiff the bond in suit, for the faithful performance of the contract. Branham and Hege entered upon the construction of the work contracted for, and prosecuted the same until they had completed about one-third part thereof, when they falsely and fraudulently represented to the plaintiff, through its board of county commissioners, that they had fully completed the one-half part or more of said work, and asked to be paid therefor the sum of $10,046.68. The plaintiff, relying upon these false and fraudulent representations, thereupon paid to them said sum of $10,046.68. As a matter of fact, Branham and Hege had not completed more than one-third part of said work, and thereupon they abandoned said work and contract, and neglected and refused to proceed with the same, and left it uncompleted. The plaintiff was compelled to, and did, complete said work, at a cost, in excess of that provided for in the contract, of $13,429.56.

The contention on behalf of the sureties is that they have been released because the plaintiff, without any estimate having been made by it or its engineer to ascertain whether one-half of the work had been completed, paid to Branham and Hege $10,046.68—a sum largely in excess of the amount to which they would have been entitled if they had actually completed one-half of the work—and because, at the time the payment was made, Branham and Hege had not completed one-half of the work, and hence were not entitled to receive any payment whatever.

It is well settled that a surety is bound only by the strict terms of his engagement, and, as he assumes the burdens of the contract without sharing its benefits, he has the right to prescribe the exact terms upon

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which he will enter into an obligation, and to insist upon his discharge if those terms are not observed. An innocent surety is always a favorite subject of legal protection. State v. Cutting, 2 Ohio St. 1; Raymond v. Whitney, 5 Ohio St. 201; Hall v. Williamson, 9 Ohio St. 17. It is not a question whether he is harmed or benefited by a disregard of the terms to which he has assented. Miller v. Stewart, 9 Wheat. 681, 6 L. Ed. 189; Manufacturing Co. v. Kimmel, 87 Ind. 560; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677. Where, by the terms of the contract, the principal is to be paid by the debtor or obligee in installments, and the payments are made in advance of the time specified in the contract, the surety will be discharged. Brandt, Sur. (Ed. 1878) § 102; Id. § 371.

Calvert v. Dock Co., 2 Keen, 639, is a case similar to the one at bar. One Streather contracted to build certain works for the dock company, and to furnish the materials. The company was to pay the agreed price of £52,200. in installments, to wit, three-fourths of the costs of the work done to be paid for every two months, on the certificate of the company's engineer, and the residue on the completion of the contract. Warburton and Laycock became sureties upon the bond of Streather for the performance of the contract. Streather entered upon the work, but failed to complete it, and finally abandoned it, and suit was instituted upon the bond. Streather had been paid, from time to time, more than three-fourths of the estimated cost of the work performed, and it was held that thereby the sureties were released. In the course of his opinion Lord Langdale, M. R., said:

"In this case the company were to pay for three-fourths of the work done every two months. The remaining one-fourth was to remain unpaid for till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work if he did not; and thus it materially tended to protect the sureties. What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which, by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances I think that their situation, with respect to Streather, was so far altered that his sureties must be considered to be discharged from their suretyship."

Leeds v. Dun, 10 N. Y. 469, is a case where the defendant was sued for the price of certain goods sold by the plaintiff to one Woodcock on the credit of the defendant's guaranty. The instrument signed by the defendant stipulated that he would be responsible for the payment of certain bills of goods to be sold on a credit of six months. The goods were sold in part on a credit of six months, and in part on a credit

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of four months, and it was adjudged that the guarantor could not be holden for any part of the goods so sold. The court, in the course of its opinion, says:

"The recitals in this instrument show, and with every precision, the contract into which the defendant proposed to enter. It was optional with the plaintiff's firm to accept the proposition, and enter into the contract, or to refuse it. If they accepted the contract, they could only do so on the terms proposed by the defendants. If they did not comply with the terms so proposed, there was no contract made, and there was no meeting of minds between the parties. The contract proposed by the defendant was to guaranty the payment of a debt to be contracted by a third person upon certain terms. The compliance with those terms formed the only consideration of the defendant's contract. The plaintiff's firm did not comply with the terms, for they sold a part of the goods ordered upon a credit of four months, instead of six months."

Bragg v. Shain, 49 Cal. 131, is a case wherein a church society contracted with Shain for the erection of a church, and was to pay for the work and materials $31,850, in installments, payable on the 1st day of each month, to the amount of 75 per cent. of the value of the materials furnished and work done during the preceding month, and the remainder was to be paid when the work was completed. One Bonnet became surety for Shain for the faithful performance of the contract. During the progress of the work the society paid Shain more than the 75 per cent. provided for in the contract. While the work was under way, Bragg, Tobin and Bonnet furnished Shain materials which were used in the construction of the building, and for which Shain neglected to pay, and they filed liens, and the present suit was instituted to enforce these liens. The trial court decided against Bonnet, holding that, as he was surety for Shain, he could not enforce his lien against the society. On appeal, Bonnet contended that as Shain had been paid by the society more than the 75 per cent., in violation of the terms of the contract, he was released as surety; and this contention was sustained by the court, which held that the failure of the society to retain in its hands the one-fourth part of the contract price, as stipulated in its contract with Shain, operated as a discharge of Bonnet as surety.

The case of Taylor v. Jeter, 23 Mo. 244, was as follows: A. agreed to furnish material and erect a building for B., and B. agreed to pay A. specified sums at particular stages in the progress of the work, the remainder to be paid 60 days after the completion of the building, and its acceptance by B. Upon this contract, C. became surety for A. The building was completed and accepted by B., and although B. received notice, before the completion of the building, of the filing of various mechanics' liens thereon, he paid the contract price to A. before he was bound by the contract to pay the same. B. afterwards had to pay the liens, and sued C. on the contract; but it was held he could

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not recover, as he had released C. by paying A. before he was bound to do so.

The case of Simonson v. Grant, 36 Minn. 439, 31 N. W. 861, is similar, in its essential features, to the case of Taylor v. Jeter, supra. Following the cases hereinbefore cited, the court held that the sureties upon the bond were to be considered as released. In the course of its opinion the court says: "In such cases the surety may be deprived of the inducement which the principal would have to perform the contract in due time, as the contract required."

In the case at bar, over $10,000 were paid to the principals before, by the terms of the contract, they were entitled to receive anything. Such a gross departure from the terms of the contract, to the prejudice of the sureties, operates to release them from the bond in suit, unless the false and fraudulent conduct of the principals in procuring the payment deprives the sureties of the right to take advantage of it. In Bebout v. Bodle, 38 Ohio St. 500, it is held, where a principal debtor, by falsely and fraudulently representing to the creditor that his surety has consented to an extension of time for payment, procures from the creditor an agreement for such extension in consideration that interest be paid, such agreement is, as to the creditor, fraudulent; and he may, upon discovery of such fraud, even after the period of extension has expired, repudiate such agreement, and sue upon the original contract without refunding or tendering back the interest paid under such invalid agreement.

It is rudimentary that fraud vitiates all contracts; and if the plaintiff was induced to make the payment to the principals by their false and fraudulent representations, without any fault or negligence on its part, it may well be that the sureties would be precluded to invoke such payment as a ground for their release from the bond in suit. But such is not the situation of the plaintiff. The contract provides that: "When said work shall have been, in opinion of party of first part, half completed, said party of first part, or its engineer, shall carefully estimate the work completed, and pay the party of the second part therefor a sum of money equal to eighty-five per cent. of the cost of the completed work, as agreed upon herein: Provided, said sum shall not exceed the amount of seven thousand four hundred and eighty dollars."

By the terms of the contract the plaintiff, or its engineer, was required carefully to estimate the amount of work completed before making any payment. The performance of this duty was important, for the protection of the sureties. But, if the plaintiff had the right to rely on the representations of the contractors, that would have been a justification for the payment of no more than $7,480; so that the fraudulent representations, relied on, afford no excuse for the payment to the contractors of the sum of $10,046.68. In no just sense can it be claimed that the plaintiff was induced to make the payment by the fraudulent representations of the contractors. It had no right to

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rely on such representations, and it was bound, either in person or by its engineer, to make the estimate of the work done for itself. If the plaintiff was misled, it was through its own fault, and the failure to perform what was required of it by the contract. In such case, it cannot shift the consequences of its own fault and want of care onto the sureties. Manufacturing Co. v. Kimmel, 87 Ind. 560.

In the opinion of the court, the demurrer must be sustained, and it is so ordered.[30]

WILLIAM MAYHEW and ANN GENT v. CRICKETT et al.

(High Court of Chancery, 1818. 2 Swanston, 185.)

The bill stated that in August, 1814, Charles Batteley, being indebted to the defendants, his bankers, in the amount of £1,000. or thereabout, secured by a warrant of attorney to confess judgment, the defendants agreed to advance to him the farther sum of £300. on condition of his procuring two persons as sureties for the repayment thereof, and also of the former balance; and, the plaintiffs having agreed to become sureties, two promissory notes, for £650. each, payable to the defendants on demand, dated the 20th of August, 1814, were signed, one by Batteley and Mayhew, the other by Batteley and Gent; that the plaintiffs had lately discovered that the defendants did not advance the farther sum of £300., nor any part of it; that in November, 1814, the defendants entered up judgment on the warrant of attorney against Batteley and issued execution thereon, and entered into possession of his dwelling house, and the stock in trade and other effects therein, and after continuing several days in possession, without consulting or apprising the plaintiffs, withdrew the execution, Batteley paying the expenses; and that in August, 1815, Batteley again becoming embarrassed, the defendants for the first time applied to the plaintiffs for payment of the promissory notes, which the plaintiffs refused; and in Michaelmas term, 1816, the defendants commenced actions against them.

The bill, charging that the notes ought in equity to be considered as void and given without consideration, that by withdrawing the ex-

[30] When the surveyor's certificate (upon which by the contract payments are to be made) has been obtained by the fraudulent concealment by the principal of defects in his work, and his faithful performance was guaranteed by the surety, the latter is not discharged. Mayor, etc., of Kingston, v. Harding, L. R. 2 Q. B. 494 (1892).

To the defense raised in the principal case, a replication of notice to the surety and his assent is good. General Steam Navigation Co. v. Rolt, 6 Com. Bench Rep. (Scott) 549 (1858).

Payment in advance of stipulated time discharges the surety at law in the federal courts. Shelton v. Am. Surety Co., 131 Fed. 210, 66 C. C. A. 94 (1904); Fidelity & Deposit Co. v. Agnew, 152 Fed. 955, 82 C. C. A. 103 (1907).

On surety's right of subrogation to reserve under building contract as against creditor of principals, see note, 10 H. L. R. 387.

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ecution against Batteley the defendants had released the plaintiffs, that Gent never requested the defendants not to press for payment of Batteley's debt, and that, if Mayhew made such request, it was in ignorance that the execution had been withdrawn, prayed that the defendants might be decreed to deliver the promissory notes to the plaintiffs, and indemnify the plaintiffs against them, and be enjoined from proceeding in the actions at law.

The defendants, by their answer, stated that, being dissatisfied with the large balance due from Batteley, they informed him that unless he procured a joint note from persons of responsibility they would take possession of his effects; and, Batteley promising to give unexceptionable security, the defendants added that if they were satisfied with the security they might advance £300. more, that when Batteley brought the two promissory notes the defendants said that they should make no farther advance till they had satisfied themselves of the security, and after inquiry refused an advance, and, admitting that the execution was withdrawn at the request of Batteley on the 6th of November, 1814, the defendants not thinking it necessary to consult or apprise the plaintiffs, who were not informed of the existence of the warrant of attorney, further stated that on the application of the plaintiffs in August, 1815, Mayhew promised to pay his note in September following, and at that time came to the defendants, representing that it was not convenient then to take up his note, but promised to pay it at Christmas, if they would wait till then; denied that they gave time and indulgence to Batteley to pay the debt secured by the promissory notes, except by withdrawing the execution, and stated that on the 14th of February, 1816, Mayhew promised, in the presence of two persons named, to take up the note for which he became answerable, on or before Lady day following, and before that promise Mayhew knew that the defendants had taken possession of Batteley's effects under the execution, and had, at the request of Batteley and his friends, abandoned the same, and relied upon the notes as a security for the balance then due to them; and the defendants stated that they had heard and believed that at the time of such promise Mayhew was in possession of a warrant of attorney given to him by Batteley to secure the payment of the £650. and interest, and that Batteley soon afterwards committed an act of bankruptcy, which prevented Mayhew from taking execution against his effects.

The defendants had recovered a verdict against the plaintiff Mayhew, before the common injunction was obtained for want of answer. On a motion, after filing the answer, to dissolve the injunction, the Lord Chancellor, by order of the 13th of December, 1817, continued it, with liberty to the defendants to proceed to trial against Mrs. Gent. The defendants, having declined to proceed to trial, not intending to prosecute their claim against Mrs. Gent, now moved to dissolve the injunction.

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Sir Arthur Piggott and Mr. Treslove, in support of the motion, insisted that the grounds on which the plaintiffs rested their equity, the want of consideration for the notes and the abandonment of execution by the principal creditor, formed a legal defense, and cited Hoare v. Contencin, 1 Bro. C. C. 27.

Mr. Hart and Mr. ———, against the motion, argued that concurrent jurisdiction of courts of equity was not excluded by the novel equitable doctrines of courts of law, and that the question of fraud in obtaining the notes was peculiarly proper for a court of equity.

Lord Chancellor [ELDON]. On the motion for an injunction, two grounds were taken: First, that the principal debtor being indebted to the defendants in £1,000., the contract on which these notes were given was that, if he should produce securities for £1,300., the defendants would advance £300. in addition to the existing debt. In considering the question whether there was that agreement, we must not lose sight of the fact that security was given for the exact sum of £1,300.; and if such was the transaction, I am not quite prepared to say that the sureties could not avail themselves of their non-liability at law as well as in equity, speaking of law at this day; for many questions (questions, for example, on marriage brokage bonds, and on lost deeds), formerly exclusive subjects of equitable jurisdiction, have, since Lord Mansfield's time become subjects of the jurisdiction of courts of law.

The second ground was that the defendants, by releasing the execution, had relinquished their remedy, at least pro tanto. I always understood that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle which prevails both in courts of law and in courts of equity. On the other hand, if the surety afterwards makes a promise to pay, he cannot object to that as a promise without consideration. The promise is valid, not as the constitution of a new, but the revival of an old, debt. So, when a bankrupt is discharged by his certificate, he cannot, for that reason, impeach a subsequent promise to pay a former debt, as a promise without consideration.

Although the amount of £1,300. is constituted here by separate promissory notes, and, although at one time the doctrine prevailed that where there were separate securities there should be no contribution, that has been exploded ever since the case of Deering v. Lord Winchelsea, 2 Bos. & Pul. 270, 1 Cox, 318. The liability of the plaintiffs must be considered with reference, not only to general principles, but to the fact that one surety promised to pay after he knew that the execution had been waived. The effect of that may be varied by the circumstance whether he then knew what was known to the co-surety.

There can be no doubt that it is a question fit to be tried at law whether, if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who

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were sureties for the due payment of the bill. The principle is that he is a trustee of his execution for all parties interested in the bill.

LORD CHANCELLOR [ELDON]. I must be informed whether the defendants abandon all claim against the plaintiff Gent. That is an important feature of the case.

The counsel for the defendants having undertaken to release the plaintiff Gent, the Lord Chancellor proceeded to give judgment.

LORD CHANCELLOR [ELDON]. The bill is filed by Mayhew and Gent, against the latter of whom I must consider the defendants as having no demand, since they prosecute none. It appears from the answer that there had been a proposition for an advance of a sum of £300. in addition to the original debt; it is now admitted that the two notes of £1,300. can be considered as a security for £1,000. only, and, therefore, each note, in a court of equity at least, is a security for only £500., the defendants never having advanced the £300. or any other sum. The bill charges, as a particular ground of the equity on which the plaintiffs insist, that two promissory notes were given, to enable the debtor to obtain time for £1,000., and a further advance of £300., and that, the advance not having been made, the notes ought not to be considered as a security for the existing debt. The mere circumstance that the plaintiffs did not know that the defendants held a warrant of attorney would be of no consequence, because sureties are entitled to the benefit of every security which the creditors had against the principal debtor, and whether the surety knows the existence of those securities is immaterial;[81] and I think it clear that, though the creditor might have remained passive if he chose, yet, if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety, both at law and in equity; and I cannot but believe that there must have been some mistake on the part of the learned judge, at nisi prius. That, however, should have been made the subject of a motion for a new trial.

The application of the defendants, in equity, proceeds on quite a different principle. They swear that in the presence of two witnesses, Mayhew, knowing that the execution had been withdrawn, promised to pay the debt; and it cannot be objected that there is a want of consideration for such a promise. If a creditor, having given time to the debtor primarily liable, makes a demand on one who is secondarily liable, and receives a promise from him, that is sufficient to sustain the demand, not as the creation of a new, but as the revival of an old, debt.

With respect to the other plaintiff, Mrs. Gent, it must be assumed that the defendants have no demand against her. That reduces the case to this singular condition, that one surety is discharged while there is a verdict against the other; and the court must consider

[81] Accord: Scott v. Knox, 2 Jones (Irish Ex.) 781 (1838), the security having been given to secure another demand in addition to the debt for which the surety was responsible.

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the effect of the discharge of one of two co-sureties. The fact that the liability arises on separate instruments affords no distinction as to the right of contribution between the sureties. The law is so settled by Deering v. Lord Winchelsea. I recollect that the decision in that case disturbed the then existing notions in Westminster Hall. Having myself been counsel against that doctrine, I was much dissatisfied with it; but on farther and maturer consideration I ought to make so much amends as to say that I am convinced it was right. When one surety has been discharged, the co-surety is entitled to say to the creditor, asserting a claim against him, "You have discharged a surety from whom I might have compelled contribution, either in my own name in equity, or using your name at law."

Another view is, whether the circumstances of the case would not raise the question whether it is competent to the defendants to make any use of the promissory notes, if the fact is, as the bill alleges, that the principal debtor had solicited a farther advance of £300., and that, when the sureties lent their names on instruments which raised a demand for £1,300., the defendants refused an advance, and now claim the notes as securities for the previous debt. There is some ground to infer that the real dealing was for an advance of £300. ultra the £1,000.; and two points therefore require consideration: First, I am by no means clear that, if the sureties could establish that, it would not be a defense at law, though I am not disposed to say that therefore a court of equity would not relieve; but, secondly, the surety must have known that the execution had been withdrawn, and his promise to pay is to be considered as a promise made, in all probability, with a knowledge of the circumstances of the case.

On the whole, I am of opinion that the plaintiff Mayhew must pay into court so much as, with what the defendants have received from the bankrupt's estate (a commission of bankrupt had been issued against Batteley), will amount to £500., without prejudice. On those terms the injunction must be continued.

ALCOCK v. HILL.

(Court of Appeals of Virginia, 1833. 4 Leigh, 622.)

This was a bill in the Superior Court of Chancery of Fredericksburg, exhibited by Pitman Hill against Abner Alcock, alleging that, Alcock having recovered a judgment in the circuit court of Stafford against James Hifflin and Richard Hill, and sued a fieri facias thereon, which was levied on their property, the plaintiff Pitman Hill and one Corbin became their sureties in a forthcoming bond for the delivery of the property at the day and place of sale; and, the forthcoming bond being returned forfeited, execution was awarded thereon against the principals and sureties. That execution was sued by Alcock, and de-

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livered to the sheriff, and if Alcock had not suspended proceedings thereon the debt might have been levied of the property of the principals, they being solvent at the time; but Alcock, without the consent or knowledge of the plaintiff, Pitman Hill, gave written directions to the sheriff to suspend proceedings on the execution till he should give further instructions. That Richard Hill, one of the principal debtors, had delivered a slave to one Hore, to be sold, and the proceeds applied to the discharge of the debt due to Alcock, of which Alcock was informed, and afterwards offered the slave for sale himself, and might have sold him at any time, or procured the sale; and it was because Alcock had the means thus placed in his own hands, or power, of obtaining satisfaction of his demand, that he directed proceedings on his execution to be suspended. That the plaintiff, Pitman Hill, being also apprised of these facts, took no steps to secure indemnity against loss by reason of his suretyship. That Alcock forbore any further proceedings for many years, until all the other obligors in the forthcoming bond had become insolvent, but had lately sued out an execution, and caused it to be levied on the property of the plaintiff. Therefore the bill prayed an injunction to inhibit Alcock from further proceedings, on his last-mentioned execution, against the plaintiff.

The injunction was awarded.

Alcock, in his answer, said that when the plaintiff, Pitman Hill, became surety in the forthcoming bond, he did so because he was told by the sheriff, and therefore expected, that indulgence could be obtained from Alcock, by the principal debtor, Richard Hill, so soon as the debt should be secured by a forthcoming bond; and it was because Alcock was apprised that this assurance had been given, and was content with such security, that he directed the sheriff to suspend proceedings on the execution, which was afterwards issued by the clerk on the forthcoming bond; that his suspension of proceedings was a mere indulgence, given without consideration, and he did not thereby preclude himself from proceeding whenever he should think proper, and he would have proceeded at any time, if the sureties had required him to do so; and that, if Richard Hill did deliver a slave to Hore to be sold for the purpose of satisfying the debt, it was a transaction between Hill and Hore, to which he, Alcock, was nowise privy. He never offered the slave for sale, nor had any power to make such sale.

It appeared in proof that, when Pitman Hill joined in the forthcoming bond as surety, he was told by the sheriff that Alcock would give Richard Hill, the principal, time to discharge the debt, provided satisfactory surety was given in the forthcoming bond, and that Alcock obtained an award of execution on the forthcoming bond; and an execution having been issued, he then directed, in general terms, that proceedings should be suspended till further instructions. It appeared, also, that Richard Hill did deliver a slave to Hore, to be sold

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and the proceeds applied to the payment of the debt due Alcock, and that this slave died in Hore's possession. But it was doubtful, upon the evidence, whether the other allegations of the bill in respect to this slave were true, namely, that he was delivered by Richard Hill to Hore, before the forthcoming bond was executed, with power to sell him, and with authority to Alcock to direct the sale, to pay the debt due him, and that this was the consideration on which Alcock gave the indulgence.

The chancellor, thinking that the allegations of the bill were proved, perpetuated the injunction. And this court, upon the petition of Alcock, allowed him an appeal from the decree.

CARR, J. It was admitted by the appellee's counsel that Alcock's suspension of proceedings on his execution would nowise impair his remedy against the surety, if that suspension was merely voluntary on his part. But they insisted that it was in consequence of an agreement upon valuable consideration, which tied up Alcock's hands, and therefore released the surety, an agreement, namely, that one of the principal debtors should put a slave in Alcock's hands, or under his power, to be sold for the debt, and that in consideration of this the execution should be suspended, which agreement, they said, was complied with by the delivery of the slave to Hore, to be sold by him for the purpose, or to be sold when Alcock should so require. If this case had been made out by the proofs, the counsel would have had pretty strong grounds to stand on. But to my mind the evidence proves no such agreement. On the contrary, I think the evidence proves that the slave was put into Hore's hands, but never into the possession or under the power of Alcock, and that this was a transaction between Richard Hill and Hore, to which Alcock was not a party, and which, indeed, was subsequent to the indulgence given by Alcock, and was nowise the consideration on which Alcock gave the indulgence. The circumstances detailed in the evidence, instead of disproving, corroborate Alcock's answer. This case, therefore, belongs to that class of cases in which it has been held that a voluntary indulgence, given by a creditor to the principal debtor, does not impair the creditor's remedy against the surety. The case of McKenny v. Waller, 1 Leigh, 434, is in point for the appellant.

The decree should be reversed, and the bill dismissed.

CABELL and BROOKE, JJ., concurred.

TUCKER, P. The direction, given by Alcock to the sheriff, to suspend proceedings on his execution against the principal till further directed, was not of itself sufficient to discharge the surety. If, indeed, a creditor engages, for a good consideration, to give indulgence, so as to tie up his hands from proceeding at any moment he may be required by the surety to do so, the surety is absolved, unless such indulgence is given with his assent. The constituents of this principle are: (1) A consideration; for, without it, a promise to indulge is not binding. (2) A promise or agreement to indulge; for, with-

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out it, the hands of the creditor are not tied, whatever collateral security he may have received. (3) That the promise should not be altogether indefinite; for an indefinite promise of forbearance is void and nugatory, and is held not to be an adequate consideration to support even a promise, since the forbearance might be but an hour, which would be a forbearance indeed, but of no advantage to the debtor. And (4) that the surety should not have assented to the indulgence given.

Trying this case upon these principles, I think it very clear that the surety was not absolved; for, as to the transaction at the time of the execution on the forthcoming bond, I think the evidence proves that the probable motive of the appellee for joining in it as a surety was the expectation of getting that indulgence for his friend which the sheriff assured him might be obtained from Alcock upon the debt being secured by a forthcoming bond. To this indulgence, then—if, indeed, the promise of it, thus unauthorized, by the sheriff, and the indefinite character of it, could bind Alcock at all—the surety himself assented. It was the consideration upon which he entered into the bond. Surely he cannot complain that that has been done which was promised by the sheriff on Alcock's behalf, and was the operative motive with himself for joining in the bond.

With regard to the transaction respecting the slave put into the possession of Hore: This, it is alleged, was a consideration for the indulgence, and sufficient to bind Alcock. Admitting the facts as they are contended for, although here was a consideration, yet there was no promise, unless we resort to the original promise at the time the bond was given. Now the fact that the principal placed collateral security in Alcock's hands, which has been lost without his default (as, in this case, by the death of the pledge) is not sufficient to discharge the surety, unless accompanied by a promise of specified forbearance. No such promise is proved, or even charged.

We must go back, then, to the promise at the time the bond was given, or there is no promise in the case. And, if we do, we can see in the indulgence given, until Hore could make such sale of the property as would be just to all parties concerned, nothing but a fair, bona fide, and honorable compliance with the engagement, made by the sheriff and ratified by Alcock, that he would give Richard Hill time to discharge the debt, provided a forthcoming bond was given with satisfactory surety, upon the faith of which promise, as I conceive, the appellee did become a surety. He cannot complain of a compliance with it, and therefore ought not to have sought this injunction.

Decree reversed, and bill dismissed.

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CAMPBELL v. ROTHWELL et al.

(High Court of Justice, Common Pleas Division, 1877. 47 L. J. Rep. Q. B. [N. S.] 144.)

This was an action against Daniel Chadwick as the acceptor, James O'Neill Mackle as the drawer, and Ephraim Rothwell as the indorser of five bills of exchange—the first, dated 1st of August, 1876, for £95. 10s., three months after date; the second, dated 8th of August, 1876, for £100., three months after date; the third, dated 11th of August, 1876, for £75. 10s., three months after date; the fourth, dated 12th of August, 1876, for £96. 14s. 6d., four months after date; and the fifth, dated 14th of August, 1876, for £16. 10s., three months after date.

The defendant E. Rothwell, whose liability was the only one in dispute, pleaded in his statement of defense, inter alia, paragraph 7, that he indorsed the said bills as surety for the defendant James O'Neill Mackle, and that the plaintiff held them without value, and also paragraph 10, which was as follows: "That he was induced to indorse the said bills as surety, as aforesaid, and at the time of such indorsing plaintiff held certain goods, or had a lien upon them, as security for the payment of the amounts mentioned in the said bills, and afterwards received other securities, for the same purpose of securing the payment of the amounts mentioned in the said bills; and if the defendant E. Rothwell were liable on and had to pay the said bills, he would have been entitled to the said securities, or the benefit thereof, and they would have been sufficient to cover his liability; and the plaintiff, without the knowledge or sanction of the defendant E. Rothwell, has so dealt with the said securities that he has materially altered the position of E. Rothwell as such surety, and has by his own acts disentitled himself from giving the said E. Rothwell the said securities, or the benefit thereof, on his paying the said bills, and the said E. Rothwell has lost the benefit thereof."

To this tenth paragraph the plaintiff replied as follows:

"As to paragraph 10, the plaintiff admits that, at the time of the indorsing of the said bills, the goods referred to were in his possession, but he had no lien thereon as security for the payment of the said bills. The plaintiff further admits that afterwards he did receive a certain other bill of exchange and a lien on the said goods as further security for the payment of the said bills. The plaintiff, however, denies that he has so dealt with the said securities last named as to alter the position of the defendant E. Rothwell in any way; the said goods still remaining in his possession, and three judgments having been recovered against the respective parties liable on the said last-named bill, but no proceeds realized, and that any right or benefit to which the defendant E. Rothwell may be entitled as against the said securities remains still in the same position and unimpaired."

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The cause was tried before Denman, J., at the last Liverpool summer assizes, when it appeared that the defendant Rothwell indorsed the several bills sued on as surety for the defendant Mackle, and that certain goods sold by the plaintiff to Mackle, and for the payment of which three of the said bills, namely, those for £100., £75. 10s., and £96. 14s. 6d., amounting to £272. 4s. 6d., had been given, were at the plaintiff's warehouse on 7th of September, 1876, when Mackle signed a document (which is set out in the judgment of Denman, J.), by which he stated that he gave the plaintiff a lien on these and other goods therein referred to, for the balance due to him from Mackle, as well as for the bills which had been so indorsed by Rothwell, as Mackle's surety. Afterwards, on 28th of October, 1876, Mackle gave one John Daniel Murphy, to whom he was indebted in £100., an order on the plaintiff, authorizing the plaintiff to deliver to him, Mackle, the said goods, and the plaintiff, to whom this order was sent, undertook to deliver the goods to Murphy on payment of £143., which was the amount of the plaintiff's claim against Mackle, exclusive of the bills for £272. 4s. 6d. Murphy had not yet paid this £143., and therefore the goods still remained with the plaintiff.

The question was whether, by reason of the plaintiff having so agreed to give up the goods to Murphy, he had not so dealt with the security he had acquired by the document of 7th September, 1876, as to discharge the surety of the defendant Rothwell, notwithstanding such security had been acquired after the bills had been indorsed by him as such surety. This question was reserved for further consideration, and was argued afterwards before Denman, J., on the motion to enter judgment for the plaintiff.

DENMAN, J. (on December 21st), delivered the following judgment:

This was an action brought against one Daniel Chadwick, as the acceptor, one James O'Neill Mackle, as the drawer, and the defendant Ephraim Rothwell, as the indorser, of five bills of exchange.

The liability of the defendant Rothwell was the only matter in dispute at the trial. Several defenses were pleaded by him which failed of proof at the trial; but the tenth paragraph of the statement of defense was as follows: [The learned judge read that paragraph.] To this paragraph the plaintiff replied as follows: [This also the learned judge read.]

It was agreed upon the trial that certain affidavits made on behalf of the plaintiff upon an application before the district registrar, if admissible—which, upon the subsequent argument before me and upon the authority of Brickell v. Hulse, 7 Ad. & E. 454, 7 Law J. Rep. Q. B. 18, and other cases cited in 1 Taylor on Evidence, p. 691, I held them to be—should not be read at length upon the trial, but be taken to be in evidence, and referred to by either party on the argument upon further consideration. It appeared from these affidavits and from the evidence at the trial that three of the bills, amounting altogether to £272. 4s. 6d., were given by Mackle to the plaintiff for

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cloths supplied by the plaintiff to Mackle, and that the name of the defendant Rothwell was given as surety. As to another bill for £16. 10s. it was given for money lent. The remaining bill sued upon—namely, that for £95. 10s.—was given for a debt due from Mackle to plaintiff for other matters. After the giving of the bills on the 7th of September, 1876, the goods sold by plaintiff to Mackle still remained at the plaintiff's warehouse, when Mackle executed a document, of which the terms were as follows:

"To Messrs. Campbell Brothers: "Liverpool, Sept. 7, 1876.

"Gentlemen—In consideration of your shipping me cloths and goods amounting to about £400., being about £128. more than my bills to you (£100., £75. 10s., and £96. 14s. 6d.—in all, £272. 4s. 6d.), I hereby give you a lien on the said goods and cloth and a carriage in your possession for the said balance due by me to you, and also for cash lent by you to me, and I also give you a lien on the same for bills drawn by me on Messrs. Daniel Chadwick & Co., and indorsed by Mr. E. Rothwell, as my surety to you, until the said bills are paid and discharged, and all expenses incidental thereto; and I further undertake to keep Mr. Rothwell clear of all liability on the said bills indorsed by him for me to you so far as I am able.

"J. O'Neill Mackle."

The plaintiff's affidavit stated that Mackle then contemplated going to America with the goods, and that the goods still remained ready for shipment at plaintiff's office. On the 28th of October Mackle gave to one Murphy an order on the plaintiff as follows:

"Liverpool, Oct. 28, 1876.

"To Saml. Campbell, Esq., Campbell Brothers:

"I hereby authorize you to deliver the goods you hold of mine and settle up with Mr. John D. Murphy, who will act for me and on my behalf, and settle all matters between us to date, and pay your claim as between yourselves. J. O'Neill Mackle."

This order was sent by Murphy to the plaintiff, who wrote, in reply, that he held the goods to his order, "subject to the condition therein mentioned," which I understand to mean the payment of the plaintiff's claim against Mackle. Murphy, whose affidavit was used by the plaintiff before the district registrar and by the defendant on the argument before me, stated that the plaintiff had undertaken to deliver the goods to him (Murphy) on the payment of £143., the amount he claims from Mackle, exclusive of the bills for £272. 4s. 6d.; but, Murphy not having paid that amount, the goods still remained in the plaintiff's hands at the time of action brought. Under these circumstances, it was contended for the defendant that he, being a surety, was discharged by reason of the plaintiff having dealt with an after-acquired security in a manner detrimental to his interests.

The main question which was argued in relation to this contention was whether a security which was not in existence at the time of the

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contract of suretyship is to be taken into account to relieve the surety. In Newton v. Charlton, 10 Hare, 646, also reported in 2 Drew. 333, Wood, V. C., in an elaborate judgment, decided that it could not; and though in a subsequent case of Pledge v. Buss, 1 John. 663, the same learned judge said that he could no longer hold that opinion to be law after an opinion of the Lords Justices to the contrary, it is remarkable that beyond a mere dictum, not necessary to the decision of the case in which it was pronounced—Pearl v. Deacon, only reported in 2 Jur. 839—as an interlocutory remark during the argument of the case, counsel were unable to find any judicial opinion overruling that of Wood, V. C., in Newton v. Charlton, 10 Hare, 646, also reported in 2 Drew. 333. The cases of Lake v. Brutton, 18 Beav. 134, 8 De Gex, M. & G. 440, 25 Law J. Rep. Chanc. 842, and Pearl v. Deacon (as reported in 24 Beav. 188, 1 De Gex & J. 461, and 26 Law J. Rep. Chanc. 761), were referred to; but in neither case, nor in the case of Pledge v. Buss, 1 John. 663—in which Wood, V. C., alluded to Newton v. Charlton, 10 Hare, 646, also reported in 2 Drew. 333, as above mentioned—was it necessary to overrule that decision. Under these circumstances, I have felt great doubt whether I ought not to adhere to the doctrine laid down in Newton v. Charlton, 10 Hare, 646, also reported in 2 Drew. 333; but, upon the whole, I think it is more probable that Pledge v. Buss, 1 John. 663, though not raising the same point, contains the expression of the final opinion of the courts of equity, including that of Wood, V. C., than the decision of Newton v. Charlton, 10 Hare, 646, also reported in 2 Drew. 333. I find that Newton v. Charlton, supra, has been treated as overruled in the last three editions of White and Tudor's Leading Cases (see 5th ed., vol. II, p. 1026), and I can see nothing unreasonable in the doctrine that a surety is discharged if the creditor has so dealt with any security he possesses that he cannot, on payment by the surety, give him all the securities he possesses, whether in existence at the time of the contract of suretyship or subsequently, in the same condition as they were when he first acquired them.

In the present case the plaintiff, as appears by the affidavit, has made an arrangement by which he has bound himself at any time to give up the goods which from the 7th of September, 1876, he held as a security for the whole of the moneys due to him from Mackle, upon receiving £143. from Murphy. This appears to me so wholly inconsistent with the security upon the goods given to the plaintiff for the express benefit of the defendant Rothwell by the document of the 7th of September, 1876, as to have materially diminished, if not entirely destroyed, the benefit of that security: and on that ground I think that the defendant Rothwell is released, and I give judgment for him accordingly.

Judgment for defendant Rothwell.[82]

[82] The earlier English cases of Newton v. Chorlton, 10 Hare, 646 (1853), per Wood, V. C., and Wade v. Coope, 2 Simons, 155 (1827), are herein overruled.

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MERRITT v. HAAS.

(Supreme Court of Minnesota, 1908. 106 Minn. 275, 118 N. W. 1023, 119 N. W. 247, 21 L. R. A. [N. S.] 153.)

Action in the District Court for Ramsey County by the trustee of the trust estate of Eugene St. Julien Cox under the last will and testament of William S. Cox, deceased, to recover $54, the unpaid balance of interest due November 20, 1905, on four promissory notes of $900 each, made by Albert Scheffer in favor of the trustee and indorsed by the defendants in this form: "In consideration of our discharge from liability as sureties on the bond of Albert Scheffer as trustee as above mentioned, we and each of us do hereby guarantee the payments of the semi-annual installments of interest on the above note at the time and place the same shall become due until said note is fully paid, and do hereby waive notice of default, protest, and notice of protest." There was no proof of service of summons on defendant McCardy and defendant Haas alone answered. The other facts are stated in the opinion. The case was tried before Orr, J., who found that defendant Haas was entitled to judgment on the merits. From an order denying a new trial, plaintiff appealed. Affirmed.

BROWN, J. The facts in this case are as follows: Albert Scheffer was duly appointed trustee of the estate of the late E. St. Julien Cox under the last will and testament of William S. Cox, deceased. There came to his hands as such in money and securities something over $9,000. Upon the acceptance of the trust Scheffer executed in proper form the usual bond in such cases, which defendants signed and executed as sureties. In 1899 Scheffer was called upon for an accounting, when it was found that he had in some way lost the entire estate and had no money or property belonging to it. An action was thereupon brought against him and sureties to recover the amount due from him. A settlement of the action was subsequently effected, by the terms of which defendants agreed to and did pay to plaintiff the sum of $1,000 in part of the shortage of Scheffer, and Scheffer made and delivered to plaintiff four promissory notes, of $900 each, payable at stated times in the future, each bearing interest at 6 per cent. per annum. Scheffer also conveyed to plaintiff a lot in St. Peter, and agreed to procure the issuance of a policy of insurance upon his life payable to plaintiff as trustee, as collateral to and as security for the payment of the notes and interest. The policy was procured as agreed upon and delivered to plaintiff. The sureties on Scheffer's bond guaranteed the payment of the interest as it became due upon the notes, but did not guarantee the payment of the principal. The premiums on the policy were not paid, by reason of which the policy lapsed. Scheffer died without paying either the principal or the interest due on the notes, his estate was insolvent, and plaintiff brought this action to recover from defendants, guarantors on the notes, the unpaid interest.

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The principal defense to the action was that Scheffer, by the terms of the settlement, agreed to make all payments of premiums to keep the insurance policy in force and that defendants were liable therefore only in the event of default; that the policy was permitted by plaintiff to lapse without notice to defendants, in consequence of which the collateral was lost, and defendants discharged from further liability. The allegations of the answer constituting this defense are expressly admitted by the reply. The trial court found the facts substantially as stated, and ordered judgment for defendants. Plaintiff appealed from an order denying a new trial.

The assignments of error present the questions: (1) Whether the findings of fact to the effect that Scheffer was by the terms of the settlement to make all payments of premiums due and to become due on the insurance policy, and that defendants were to pay the same only in the event of his failure to do so, are sustained by the evidence; and (2) whether the conclusions of law that plaintiff cannot recover are justified by the facts found.

The first question is not important; for, as urged by plaintiff, defendants' guaranty was absolute and unconditional, and the loss of the collateral by the lapsing of the policy for non-payment of premiums constituted no defense. It is probable, however, that the facts found by the court on this subject, being in harmony with the admissions of the reply, were fully justified; for the disputed fact was not in issue by the pleadings, and though the evidence is conclusive against the finding it cannot be said that it would have been the same, had the fact been an issue for trial. But, as stated, this question is not of controlling importance; for, with this special finding in the case, the conclusion of law should have been that plaintiff was entitled to judgment as prayed for in the complaint.

Ordinarily the obligation of the guarantor of payment is determined by the character of the contract to which the guaranty relates. In the case at bar the promissory notes given by Scheffer called for the payment of semi-annual interest at the rate of 6 per cent. per annum. Defendants' contract, indorsed thereon, was that they "guaranteed the payment of the installments of interest until the note was paid in full." There is nothing in the principal contract, the note, or in the guaranty, to qualify the liability thus assumed by the guarantors, and within the rule in this state it was absolute and unqualified, and obligated them to pay the interest as it matured. The contract imposed no duty or obligation upon the plaintiff, as trustee or guarantee, to protect the guarantors from loss, either by keeping the policy of insurance in force, or in efforts to collect the note and interest from Scheffer, and, if neglect on his part in this respect be conceded, it constitutes no defense, nor does it relieve defendants from their unconditional agreement to pay. The rule is otherwise in some of the states, but the doctrine suggested was laid down by this court in an early day (Hungerford v. O'Brien, 37 Minn. 306, 34 N. W. 161), and has

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since been followed (Osborne & Co. v. Gullikson, 64 Minn. 218, 66 N. W. 965).

But, even without this rule, the facts disclosed by the record negative any duty on the part of plaintiff to keep the policy in force or to notify defendants of the failure of Scheffer to pay the premiums. The answer alleges and the reply admitted the fact that Scheffer was to make all payments of premiums, and no stipulation is shown to impose the duty upon plaintiff to see to it that he performed his part of the agreement. The law imposes no such duty, within the rule of absolute liability of guarantors of payment; nor did the contract. It was, therefore, as much the duty of defendants to see that the premiums were paid as it was the plaintiff's. A distinction is made in contracts of this kind between guarantors of collection and absolute guarantors of payment. As to the former the creditor is under certain obligations to protect the guarantor. Nelson v. Munch, 28 Minn. 314, 9 N. W. 863; Peterson v. Russell, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. Rep. 634; Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033. But the rule does not apply to an unconditional undertaking to pay if the principal debtor fails to do so. While defendants were sureties in the first instance upon Scheffer's bond, that relation ceased and terminated upon the consummation of the settlement, and they then became absolute guarantors.

It is also urged that the contract of guaranty is unreasonable and void, and should not be enforced. The precise point is that by the terms of the guaranty defendants obligated themselves to pay the accruing interest "until the note is paid in full," and it is urged that, because of the fact that Scheffer is dead and his estate insolvent, the principal of the note will never be paid, and defendants' obligation to pay the interest will therefore run on forever, and that they can only relieve themselves by paying the principal, which they did not contract or agree to do. If the suggested condition be the legal result from the terms of the contract, defendants might well complain, and their contention that the contract is unreasonable and oppressive would come with force and merit. But we conclude, after some reflection, that the contract should not be so construed as to create a liability extending beyond the grave. Whenever guaranty contracts of this nature have come up for consideration, the courts have held that the liability of the guarantor ceases at the due date of the note. Hamilton v. Van Rensselaer, 43 N. Y. 244; Rector v. McCarthy, 61 Ark. 420, 33 S. W. 633, 31 L. R. A. 121, 54 Am. St. Rep. 271; Bousquet v. Ward, 116 Iowa, 126, 89 N. W. 196. The rule has reasonableness and common sense to support it, and we apply it to the case at bar. Any other rule would permit the creditor and principal debtor to prolong the guarantor's liability indefinitely. The legal inference in such a case ought to be that the parties contracted on the supposition that the maker of the note would pay it at maturity, and, unless the agree-

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ment gave some authority to the creditor to extend the time of payment, the guarantor should be relieved at that time.

The interest claimed in this case covers the period before the notes fell due, and for the reasons stated plaintiff is entitled thereto, if on a new trial the facts are the same as they appear in the record before us.

Order reversed, and a new trial granted.[33]

SPRINGER v. TOOTHAKER.

(Supreme Judicial Court of Maine, 1857. 43 Me. 381, 69 Am. Dec. 66.)

Reported by May, J.

This action is against a surety upon a note of hand. An action had been brought and judgment recovered against the principal debtor. Property attached upon the writ had been seized by virtue of an execution upon that judgment, advertised for sale, and abandoned by order of the plaintiff, and without consent of this defendant, whereupon this action is brought to recover the amount of the note against the surety.[34]

HATHAWAY, J. The note upon which this action was brought was signed by the defendant and H. P. Toothaker, who were legally holden thereon as joint and several promisors.

The defendant, however, was in fact only the surety of H. P. Toothaker, and that was known by the plaintiff. Hence the defendant is entitled to all the benefits belonging to the character of a surety.

The evidence reported does not authorize the conclusion that there was any such agreement between the plaintiff and H. P. Toothaker to enlarge the time of payment as would operate as a discharge of the defendant from his liability as surety on the note. The defendant offered to prove that after the note became due the plaintiff commenced a suit thereon against H. P. Toothaker, the principal debtor, and attached as his, a large amount of personal property, and certain interests in real estate; that he prosecuted the suit to final judgment, on which he duly obtained execution, which he neglected to

[33] This judgment was subsequently reversed, but on the ground that the court in the above opinion had been under a misapprehension, and had supposed that the interest sought to be recovered accrued prior to maturity, when in fact the interest accrued after maturity, and hence was outside the terms of the contract.

But if one party to the contract is required by this contract with the principal to keep certain property on which the principal is to be employed insured against loss by fire an omission to insure will discharge the surety in toto. Watts v. Shuttleworth, 5 H. & N. 235 (1860); Id., 7 H. & N. 355 (1861).

Accord, as to life insurance not requiring premiums to be paid by creditor to whom they have been pledged. Coates v. Coates, 33 Beav. 249 (1863–64); Wheatley v. Bastow, 7 De G., M. & G. 261 (1855).

[34] The arguments of counsel are omitted.

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levy on the personal property attached, and ordered the officer in possession, by virtue of the attachment, to surrender it, which he did; that the equity of redemption attached was, by the plaintiff's direction, seized on the execution by the officer holding it for collection, and duly advertised for sale, at a time and place named, but that it was not exposed for sale; that the sale was postponed from time to time, and the attachment lost and abandoned, by the plaintiff's order, and without the defendant's consent, and that the equity of redemption was worth $600, and would have sold for that sum, if it had been exposed for sale; all of which testimony offered was excluded by the presiding judge, and the question presented to the court is whether or not it was properly excluded.

The defendant, the surety, is sued alone, and whatever would discharge the surety in equity will be a good defense in law. Baker v. Briggs, 8 Pick. (Mass.) 128, 129, 19 Am. Dec. 311, and authorities there cited.

The contract of suretyship imports entire good faith and confidence in the whole transaction. In equity, a creditor, who has the personal contract of his debtor with a surety, and has also, or takes afterwards, property from the principal, as security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as for himself, and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety, to the amount of the property so surrendered. People v. Janson, 7 Johns. (N. Y.) 337, 5 Am. Dec. 275; Rees v. Berrington, 2 Vesey, Jr., 542; Law v. E. I. Co., 4 Vesey, 849; Baker v. Briggs, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; 1 Story's Eq. §§ 324–326.

When the plaintiff had recovered judgment against the principal debtor, his right had attached absolutely to the property which he had taken on the writ, and remained a fixed and permanent lien for 30 days. In the Matter of Cook, 2 Story, 376; Rev. St. c. 114, § 32. And if he voluntarily surrendered it without the defendant's consent, he did so at the peril of discharging the defendant as surety for the amount thus surrendered.

Although the plaintiff was not legally bound to use active diligence in collecting the debt of the principal, and the surety would not be discharged by reason of his delay in the matter, and though the plaintiff might have discontinued proceedings against the principal debtor, which he need not have instituted, yet it would be clearly inequitable to allow him to abandon an absolute lien or security upon the property of the principal, which he had obtained as the result of those proceedings, and to retain his hold upon the security for the whole debt. 2 Am. Leading Cases, 256.

The plaintiff was not bound, at his own risk and expense, to seize and sell on the execution the personal property attached when the title might be doubtful. Page v. Webster, 15 Me. 249, 33 Am. Dec. 608.

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But, as to the equity of redemption, the testimony offered and excluded presents it as the property of the principal debtor, upon which the plaintiff had obtained an absolute lien for the payment of the debt, and which, without any risk or expense to the plaintiff, would have been sold for $600, and appropriated for that purpose, unless he had interfered and prevented the sale.

He had no equitable or legal right, to the injury of the surety (the defendant), thus to surrender and abandon such security.

The testimony excluded was legally admissible, and should have been received.

In addition to the numerous authorities cited in argument, see Edgerly v. Emerson, 3 Foster (N. H.) 555, 55 Am. Dec. 207, Adams' Eq. 269 and 270, and the opinion of Tenney, J., in Fuller v. Loring, 42 Me. 481.

As agreed by the parties, the action must stand for trial.[35]

MT. STERLING IMPROVEMENT CO. v. COCKRELL.

(Court of Appeals of Kentucky, 1902. 70 S. W. 842, 24 Ky. Law Rep. 1151.)

Appeal from Circuit Court, Montgomery County.

Action by the Mt. Sterling Improvement Company against M. O. Cockrell and others. From a judgment in favor of the defendants, plaintiff appeals. Affirmed.

BURNAM, J. In 1895 the Mt. Sterling Improvement Company recovered a judgment against J. H. Oldham for $250, from which he prosecuted an appeal to this court, and executed a supersedeas bond, with the appellees M. O. Cockrell and H. K. Green as his securities. The judgment of the lower court was affirmed, and the improvement company filed the mandate issued thereon in the lower court, and on the 25th of June, 1898, had an execution issued upon the judgment, which was levied by the sheriff of Montgomery county, on the 29th of June 1898, on a tract of land belonging to J. H. Oldham of sufficient value to have satisfied it. On the 23d of July, 1898, after the levy of the execution, Oldham sold the land for a cash consideration to one Hall; and on the 1st day of August, 1898, the improvement company, by its attorney, indorsed on the execution these words: "The sheriff is directed to hold this execution until further orders. August 1, 1898, Mt. Sterling Improvement Co." And in January, 1899, this action was brought against the appellees on the supersedeas bond.

The defendants Cockrell and Green answered, admitting that they signed the supersedeas bond, and set out in detail the facts recited above, with the further allegation that neither the plaintiff nor the sheriff had

[35] Accord: Hubbell et al. v. Carpenter, 5 Barb. (N. Y.) 520 (1849).

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complied with the requirements of sub-section 2 of section 2358a of the Kentucky Statutes, which provides that "no attachment or execution hereafter issued, nor any levy or sale under either, shall in any manner affect the right, title to, or interest of a subsequent purchaser, lessee or incumbrancer without notice thereof of any real estate or any interest therein upon which such attachment or execution may be or may have been levied, except from the time there shall be filed in the office aforesaid a memorandum, showing the number and style of the action in which said attachment or execution issued, the court from which it issued, the number, if any, of such attachment or execution, the date thereof, and the name of the persons in whose favor and against whom respectively it issued." And in an amended answer they allege that, whilst the execution was in the hands of the sheriff and in full force, they ordered the sheriff, pursuant to an agreement made with J. H. Oldham, to hold up said execution until further orders, and that, by reason of such agreement and direction given the sheriff, he failed to comply with the requirements of sub-section 2 of section 2358a of the Statutes.

The plaintiff, in his reply, denied that they agreed to hold up the execution, or that they had directed the sheriff to do so, and pleaded that it was the defendant's duty to have filed the notice required by sub-section 2 of section 2358a.

The trial court, by its instructions, confined the case to the defense relied on in the amended petition, telling the jury to find for the company unless they believed from the evidence that after the execution was placed in the hands of the sheriff, and levied upon property of the defendant sufficient to have satisfied same, it directed the sheriff not to proceed with his levy, and that in consequence of such directions the sheriff failed to collect it before the 23d of July, 1898.

The testimony is conflicting. Oldham testified that both the president and secretary of the company consented to suspend the collection of the execution until there could be a settlement of the affairs of the company, and that, with their consent and by their direction, he communicated this fact to the sheriff, and that he thereafter sold the property to Hall. The sheriff, to some extent, corroborated the statement of this witness, whilst Childs, the secretary of the company, emphatically denies that either he or Baum, the president, ever agreed that the collection of the execution should be suspended or that they so instructed the sheriff. Upon this issue, sharply drawn both by the testimony and the instructions, the jury found for the defendant.

The law is well settled that when a plaintiff issues an execution against the defendant, which is levied upon property sufficient to satisfy it, a lien on the defendant's property inures to the security; and, if that lien is discharged or lost through the negligence or misconduct of either the plaintiff or the sheriff, the execution debt is considered paid, in so far as the surety is concerned. See Dills v. Cecil, 67 Ky. 579; Herman, Ex'ns, 254; Brandt, Sur. (1st Ed.) § 373. The

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appellant company was under no obligation to appellees to have sued out the execution against Oldham. They could have looked, if they so elected, directly to the supersedeas bond for a satisfaction of their judgment. But having elected to proceed by execution, and having acquired by their levy a lien upon the property sufficient to have satisfied their judgment, they were not at liberty to abandon the security so obtained for the payment of their judgment; and if by their orders the sheriff failed to proceed with the collection of their execution, and in consequence thereof their security was lost, they cannot look to appellees for its payment.

Judgment affirmed.[36]

YOUNG v. CLEVELAND.

(Supreme Court of Missouri, 1862. 33 Mo. 126, 82 Am. Dec. 155.)

Appeal from Ste. Genevieve Circuit Court.[37]

DRYDEN, Judge, delivered the opinion of the court.

This is a suit brought before a justice of the peace, by Young against George W. Cleveland, on a note made by the defendant, Wm. Cleveland and Dudley Horn, for $205.37½, payable to the plaintiff's testator, on which several partial payments had been made, reducing the demand to a sum within the jurisdiction of a justice of the peace. The case was tried before the justice, and taken to the circuit court, where, upon a trial anew, after the plaintiff had read the note, the defendant proved that he and Horn were merely the securities of William Cleveland; that after the note became due Wm. Cleveland, the principal debtor, confessed a judgment before a justice of the peace, in favor of the plaintiff, for the balance due on the note; that the plaintiff took execution and caused it to be levied on personal property of said William of the value of $90; that before the sale of it under the execution an agreement was made between the parties

[36] Accord: Sneed's Ex'r v. White, 3 J. J. Marsh. 525, 20 Am. Dec. 175 (1830).

In Griesmere v. Thorn, 32 Pa. Super. Ct. 13 (1906), the court (per Porter, J.) said: "That the mere failure to follow up the general lien of a fi. fa. by a levy upon and sale of the property of a principal, even where the principal had, at the time the writ was in the sheriff's hands, sufficient personal property to pay the judgment, will not release a surety who has not required the creditor to proceed on his execution, has been definitely decided. Morrison v. Hartman, 14 Pa. 55."

The Griesmere Case was decided in accord with this view, which proceeds on the theory that "the distinction between the lien of the writ and the lien of the levy seems to be that the latter is a technical satisfaction of the judgment." Stephens v. Bank, 88 Pa. 157, 32 Am. Rep. 438 (1879).

Where the surety undertook that certain judgments against a third person shall be paid in full, the judgments being assigned by the surety to the promisee, the promisee was held to be under no duty to revive the judgment in the absence of express agreement. Campbell v. Sherman, 151 Pa. 70, 25 Atl. 35. 31 Am. St. Rep. 735 (1892).

On release of execution as a discharge of surety, see note, 13 H. L. R. 415.

[37] The arguments of counsel are omitted.

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whereby the said William gave to the plaintiff an order for his (said William's) wife's interest in the estate of her father, of the value of $100, in lieu of the property levied on, and the plaintiff thereupon caused the levy to be discharged and the property to be restored to said William.

The circuit court held that the defendant was entitled to his defense to the benefit as well of the value of the property levied and restored, $90, as to the proceeds of the order, $100, and, the two sums exceeding in amount the unpaid balance on the note, found a verdict for the defendant. Upon what principle the value of the property levied on is, under the circumstances of the case, made to discharge any part of the debt, is not easy to see. If it be said a levy on personal property is a satisfaction of the judgment, it is replied it is so only conditionally; that where the property is restored to the possession of the defendant, it is not a satisfaction in law of the judgment. Walker v. McDowell, 4 Smedes & M. (Miss.) 135, 43 Am. Dec. 476; Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; Marshall v. Morris, 13 Ga. 187.

[Here the property was returned to the owner.]

Nor is there any ground of defense in the assumption that the plaintiff, the creditor, has parted with a security from the principal debtor to the prejudice of the defendant, a surety (1 Story, Eq. Juris. 322), for the reason that the security was surrendered in lieu of property of greater value, which could not have been reached by legal process, and which was thus applied in extinguishment of the debt pro tanto. The discharge of the levy was beneficial—not injurious—to the defendant.

The circuit court committed error in its declaration of the law, and for this cause its judgment is reversed, and the cause remanded for a new trial; the other Judges concurring.

SECTION 3.—VARIATION BY CREDITOR (OR PROMISEE) AND PRINCIPAL OF ORIGINAL AGREEMENT AS TO WHICH SURETY CONTRACTED

MERSMAN v. WERGES et al.

(Supreme Court of the United States, 1884. 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641.)

This is a bill in equity, filed in the Circuit Court of the United States for the District of Iowa by Joseph J. Mersman, a citizen of Missouri, against Caspar A. Werges and wife, citizens of Iowa, to

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foreclose a mortgage of her land in Iowa, executed on September 1, 1870, by the husband and wife to E. H. Krueger, likewise a citizen of Iowa, "to be void upon condition that the said Caspar A. Werges shall pay to the said E. H. Krueger the sum of six thousand dollars as follows, viz., one year from date, with ten per cent. interest thereon, according to the tenor and effect of his promissory note of even date herewith."

The bill originally set forth the note as signed by both husband and wife, but, after the coming in of the answer, was amended by leave of court so as to allege it to be the note of the husband only. The case was heard upon pleadings and proofs, by which it appeared to be as follows:

The husband and Krueger were members of a partnership engaged in carrying on a mill, Krueger being the active partner, and Werges and his wife living on a farm which belonged to her. The plaintiff agreed with Krueger to lend to the husband, for the benefit of the partnership, $6,000 on the security of the farm; and the wife agreed, for the accommodation of the partnership, to execute a mortgage of the farm. The husband signed a note, payable to Krueger or order, and corresponding in terms with the mortgage, and the husband and wife executed the mortgage, and delivered the note and mortgage to Krueger. While they were in Krueger's hands, the name of the wife was subscribed to the note, under that of the husband, by Krueger or by his procurement, without the knowledge or consent of either husband or wife. Krueger indorsed the note, and delivered the note and mortgage to the plaintiff, who thereupon, not knowing that the wife had not herself signed the note, advanced the money to him for the partnership.

The Circuit Court held that the addition of the wife's name to the husband's note was a material alteration of the note, and made void the mortgage; and dismissed the bill. See Mersman v. Werges, 3 Fed. 378, 1 McCrary, 528. The plaintiff appealed.[38]

Mr. Justice GRAY delivered the opinion of the court. He stated the facts in the foregoing language and continued:

This court is of opinion that the decree of the Circuit Court cannot be sustained. The difference of opinion is not upon the facts of the case, but upon their legal effect.

A material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract, and substitutes a different agreement for that into which he entered. In the application of this rule, it is not only well settled that a material alteration of a promissory note by the payee or holder discharges the maker, even as against a subsequent innocent indorsee for value, but it has been adjudged by this court that a material alteration of a note, before its delivery to

[38] The arguments of counsel are omitted.

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the payee, by one of two joint makers, without the consent of the other, makes it void as to him, and that any change which alters the defendant's contract, whether increasing or diminishing his liability, is material, and therefore the substitution of a later date, delaying the time of payment, is a material alteration. Wood v. Steele, 6 Wall. 80, 18 L. Ed. 725. See, also, Angle v. Northwestern Insurance Co., 92 U. S. 330, 23 L. Ed. 556; Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, and cases there cited.

The present case is not one of a change in the terms of the contract, as to amount or time of payment, but simply of the effect of adding another signature, without otherwise altering or defacing the note. An erasure of the name of one of several obligors is a material alteration of the contract of the others, because it increases the amount which each of them may be held to contribute. Martin v. Thomas, 24 How. 315, 16 L. Ed. 689; Smith v. United States, 2 Wall. 219, 17 L. Ed. 788. And the addition of a new person as a principal maker of a promissory note, rendering all the promisors apparently jointly and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker or makers, has been held in the courts of some of the states to be a material alteration. Shipp v. Suggett, 9 B. Mon. (Ky.) 5; Henry v. Coats, 17 Ind. 161; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Hamilton v. Hooper, 46 Iowa, 515, 26 Am. Rep. 161. However that may be, yet where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker. Montgomery Railroad v. Hurst, 9 Ala. 513, 518; Stone v. White, 8 Gray (Mass.) 589; McCaughey v. Smith, 27 N. Y. 39; Brownell v. Winnie, 29 N. Y. 400, 86 Am. Dec. 314; Wallace v. Jewell, 21 Ohio St. 163, 172, 8 Am. Rep. 48; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306.

The English cases afford no sufficient ground for a different conclusion. In the latest decision at law, indeed, Lord Campbell and Justices Erle, Wightman and Crompton held that the signing of a note by an additional surety, without the consent of the original makers, prevented the maintenance of an action on the note against them. Gardner v. Walsh, 5 El. & Bl. 83. But in an earlier decision, of perhaps equal weight, Lord Denman and Justices Littledale, Patteson and Coleridge held that in such a case the addition did not avoid the note, or prevent the original surety, on paying the note, from recovering of the principal maker the amount paid. Catton v. Simpson, 8 Ad. & El. 136, 3 Nev. & Per. 248. See, also, Gilbert on Evidence, 109. And in a later case, in the Court of Chancery, upon an appeal

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in bankruptcy, Lords Justices Knight-Bruce and Turner held that the addition of a surety was not a material alteration of the original contract. Ex parte Yates, 2 De G. & Jon. 191, 27 Law Journal (N. S.) Bankr. 9.

The case at bar, being on the equity side of the court, is to be dealt with according to the actual relation of the parties to the transaction, which was as follows: The note, though in form made by the husband to his partner, Krueger, and indorsed by Krueger, was without consideration as between them, and was in fact signed by both of them for the benefit of the partnership. The mortgage of the wife's land was executed and delivered by her and her husband to Krueger for the same purpose. The name of the wife was signed to the note by Krueger, or by his procurement, before it was negotiated for value. The plaintiff received the note and mortgage from Krueger, and advanced his money upon the security thereof, in good faith and in ignorance that the note had been altered. If the wife had herself signed the note, she would have been an accommodation maker, and, in equity at least, a surety for the other signers; and neither the liability of the husband as maker of the note, nor the effect of the mortgage executed by the wife, as well as by the husband, to secure the payment of that note, would have been materially altered by the addition of her signature. There appears to us, therefore, to be no reason why the plaintiff, as indorsee of the note, seeking no decree against the wife personally, should not enforce the note against the husband and the mortgage against the land of the wife.

This suit, being between citizens of different states, and founded on a negotiable promissory note, the indorsement of which to the plaintiff carried with it as an incident, in equity, the mortgage made to secure its payment, was within the jurisdiction of the Circuit Court, under Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), although Krueger, the payee and mortgagee, could not have maintained a suit in that court. Sheldon v. Sill, 8 How. 441, 450, 12 L. Ed. 1147; Tredway v. Sanger, 107 U. S. 323, 2 Sup. Ct. 691, 27 L. Ed. 582.

Decree reversed.†

ZEIGLER v. HALLAHAN.

(Circuit Court of Appeals of the United States, Third Circuit, 1904. 131 Fed. 205, 66 C. C. A. 1.)

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

† See note in 16 H. L. R. 511, on "Alteration of Principal Obligation or Variation of Risk as Defense to Surety."

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DALLAS, Circuit Judge. The decision of the court below was based upon a case stated[89] as follows:

"The plaintiff, Mary Helen Zeigler, on April 2, 1901, made, executed, and delivered to one Moses H. Lichten an indenture of lease for the premises known and numbered as No. 50 North Eighth street, in the city of Philadelphia, of which indenture a copy is hereto attached, marked 'Exhibit A,' and made a part hereof, and the defendant, Peter T. Hallahan, by writing, became surety for the fulfillment of all the obligations of said Moses H. Lichten under and by virtue of said indenture of lease; said contract of suretyship being endorsed on Exhibit A. On or about April 29, 1901, an agreement supplemental to said indenture of lease, without consultation with or approval of the defendant, was executed by and between the plaintiff and the said Moses H. Lichten, as follows:

" 'It is hereby mutually agreed between M. Helen Zeigler and Moses H. Lichten, the parties to the foregoing indenture of lease, that the following shall become part and parcel thereof with like effect, as if the same were embodied in the foregoing agreement.

" 'It is hereby further covenanted and agreed in the event of the total or partial destruction of the within demised premises, rendering the same untenantable by reason of fire or other casualty, this lease shall from such time become absolutely null and void and the within lease shall be surrendered by the lessee to the lessor.

" 'In witness whereof the parties hereunto set their hands and seals this 29th day of April, A. D. 1901.

" 'Mary Helen Zeigler. [Seal.]
" 'Moses H. Lichten. [Seal.]'

"Said Moses H. Lichten violated the covenants and conditions of said lease, by subletting the premises thereby let and demised, and by assigning said lease without the consent of the plaintiff, and by cutting a passageway through the south party wall of said premises into the adjoining premises, in consequence whereof, on January 4, 1902, the plaintiff, by virtue of the warrant of attorney to confess judgment in ejectment contained in said lease, entered a judgment in ejectment against said Moses H. Lichten in the court of common pleas, No. 3, for the county of Philadelphia, of December term, 1901, No. 2,180, and issued a writ of habere facias possessionem against Moses H. Lichten for the recovery of possession of said premises. * * * On April 30, 1902, the plaintiff issued an alias writ of habere facias possessionem under the aforesaid judgment in ejectment, and, by virtue of said writ, recovered possession of said premises, which until said date remained in the possession of said Lichten. * * *"

The contract of suretyship was as follows:

"For the valuable consideration heretofore received, I, Peter T. Hallahan, of the city of Philadelphia, for myself, my heirs, executors

[89] The case stated has been greatly abridged.

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and administrators do hereby covenant and agree to and with the above named lessor, her heirs and assigns, that if the foregoing agreement entered into by and between the lessor and the lessee therein named, shall not be well and faithfully performed on the part of the lessee for and during the term of three years, eight months and fifteen days from the first day of May, A. D. 1901, that then the said agreement shall be promptly performed by me and that I will pay all damages arising of any breach of said agreement. And, further, that if the said lessee, his heirs, executors or administrators or any of them, shall fail to pay the rent reserved in the aforesaid agreement punctually, at the days and times the same shall fall due, that then immediate recourse may be had and made to me by demand, suit or otherwise. * * *

"And also I do further agree that my liability under the aforesaid agreement of Lease between the lessor and the lessee shall continue according to the terms thereof so long as the liability of the said lessee shall continue for and during the term above mentioned.

"Witness my hand and seal the second day of April, A. D. 1901.

"H. F. Turner. P. T. Hallahan. [L. S.]"

The Circuit Court entered judgment for the defendant, and, to maintain the averment that the judgment should have been for the plaintiff, two propositions have been submitted to this court, which will be separately considered:

1. It is said that "the defendant in error was not only not prejudiced or damaged, but could not possibly have been prejudiced or damaged, by the execution or operation of the supplemental agreement." This assertion is not unquestionable, but it need not be questioned, for, in our opinion, the true subject of inquiry in such a case as this is not as to whether the change made in the principal contract without the surety's assent was or could be prejudicial to him, but is as to whether it effected a material alteration of the agreement to which his undertaking of suretyship related. If it did, as in this case is indubitable, he was relieved from liability, and for the obvious reason that the identical contract to which alone his obligation attached had ceased to exist.

In Bonar v. McDonald, 3 H. L. Cas. 226-238, the rule was stated to be "that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety."

In Reese v. U. S., 9 Wall. 14, 19 L. Ed. 541, Reese was surety in a recognizance conditioned that one Limantour "should personally appear at the next regular term of the circuit court to be held in the city of San Francisco, and at any subsequent term to be thereafter held in that city." At the next subsequent term of that court the district attorney moved for and obtained a postponement of Liman-

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tour's trial, to which postponement he assented. The court below held that in this there was no ground for exemption of the bail from liability on the recognizance; but the Supreme Court, in an opinion delivered by Mr. Justice Field, reversing the judgment, said: "The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. * * * The stipulation to postpone * * * was inconsistent with the condition of the recognizance. * * * The stipulation, in other words, superseded the condition of the recognizance. * * * The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of the obligation. It has released him from the obligation with which they covenanted he should comply, and substituted another in its place. * * * And the law upon these matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In Cross v. Allen, 141 U. S. 537, 12 Sup. Ct. 67, 35 L. Ed. 843, the court stated the rule, of which it was "not unmindful," to be "that any material change in the contract on which he is a surety, made by the principal parties to it, without his assent, discharges the surety, even though he may be benefited by such change; the reason being that he has not assented to the contract in its altered form, and has a right to stand upon the very terms of his undertaking."

There is nothing in the opinion of the Supreme Court in Roach v. Summers, 20 Wall. 169, 22 L. Ed. 252, which, when read with its context, does not appear to be in harmony with the other deliverances of that court. It was there said, it is true, that a certain arrangement "could not work a discharge of the sureties, unless it placed them in a different position from that which they occupied before it was made"; but that, in saying this, it was understood that the arrangement referred to would have placed them in a different position if it had changed the principal contract, is plainly shown by the observation which almost immediately follows, that "it [the arrangement] was no alteration of the original contract, and had no effect upon it."

The decisions of the Pennsylvania courts are in accord with those of the Supreme Court of the United States. The rule in that state was declared, in Nesbitt v. Turner, 155 Pa. 431, 26 Atl. 750, to be: "When the principal party modifies his contract, it is fatal to its validity, as against the surety, whose assent has not been obtained, even if it be for his benefit, or if it do him no harm." And in Bensinger

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v. Wren, 100 Pa. 505, it was said that: "Any alteration of a contract by the principal parties, without the assent of the surety, is fatal to its validity, as against the surety. Even if he sustains no injury by the change, or if it be for his benefit, he has a right to stand upon the very terms of his obligation, and is bound no further. Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him. Miller v. Stewart, 9 Wheat. 680 [6 L. Ed. 189]; Smith v. United States, 2 Wall. 219 [17 L. Ed. 788]."

2. It has been, however, further contended that "the contract of suretyship shows on its face that the general law, by which such contracts are to be construed strictly in favor of the surety, has no application to this case"; and Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, has been cited in support of this contention. But it does not sustain it. The court there said that it had been "argued with much persuasiveness that this rule of strictissimi juris, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary considerations, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation, and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract." But the court declined to express an opinion upon this subject, and remarked that: "It is at least open to doubt, however, whether any relaxation of the rule should be permitted, as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of strictissimi juris, and with the understanding that it is entitled to the ordinary protection accorded to guarantors against changes in the contract or extensions of the time of payment."

Hence it is evident that it was not really decided that the rule in question should be relaxed, even as against a company which, as matter of business and for compensation, assumes obligations like that upon which this action was founded; and we are not prepared to say that such companies are any less entitled to rely upon the protection which that rule affords than is the "ordinary guarantor," who lends his signature without pecuniary consideration. But even if guaranty companies were excluded from that protection, it would not follow that it should be denied to the surety in this case. He certainly is not a guaranty company, nor does it appear that he undertakes as a matter of business to become surety; and there is nothing to indicate that in this particular instance he received any compensation for doing so, unless it be the formal mention of "valuable consideration" in the instrument itself, and this, in our opinion, should not, for the present purpose, be regarded as proof that he was in fact compensated. Clearly, as it seems to us, the question discussed, but not decided, in Guaranty Co.

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v. Brick Co., has no application to such a state of facts as is disclosed by the record before us.

The judgment of the Circuit Court is affirmed.[40]

BETHUNE, Plaintiff in Error, v. DOZIER, Defendant in Error.

(Supreme Court of Georgia, 1851. 10 Ga. 235.)

Debt, in Aluscogee Superior Court.[41]

LUMPKIN, J. Was the Circuit Court right in holding that the Terrys might accept of 680 acres of pine land, in lieu of the 800 stipulated by Dozier to be furnished for the use of the sawmill, without discharging Bethune, the surety?

1. No principle of law is better settled at this day than that the undertaking of the surety, being one stricti juris, he cannot, either at law or in equity, be bound farther or otherwise than he is by the very terms of his contract, and that, if the parties to the original contract think proper to change the terms of it without the consent of the surety (which is not disputed they have a right to do), the surety is discharged.

He is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts, so as to be his contract to a certain extent and not for the residue. He is either bound in toto or not at all.

Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. "Non hæc in fœdera veni" is an answer in the mouth of the surety, from which the obligee can never extricate his case, however innocently, or by whatever kind intentions to all parties, he may have been actuated. Mackay and McDonald v. Dodge and Mackay, survivors, etc., 5 Ala. 388; Walsh v. Bailie, 10 Johns. (N. Y.) 180; Leavitt v. Savage, 16 Me. 72; Bank of Washington v. Barrington and Others, 2 Pen. & W. (Pa.) 27; Miller v. Stewart, 4 Wash. C. C. 26, Fed. Cas. No. 9,591; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199; United States v. Vanzandt, 11 Wheat. 184, 6 L. Ed. 448; Whetcher v. Hall, 5 B. & C. 269 (11 Eng. Com. Law, 225); Herd v. Nadham, 1 East, 619; Campbell v. French, 2 H. Black, 163, 6 T. R. 200; Barker v. Barker, 1 T. R. 289; Strange v. Lee, 3 East, 484; Myers v. Edge, 7 T. R. 254.

[40] In many cases the decisions depend upon ascertaining by interpretation whether a stipulation is a material part of the contract or is merely incidental. See Evans v. Earle, 10 Ex. 1 (1854).

[41] The statement of facts is omitted.

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I will refer briefly to the principles established in several of these leading cases, and apply them to the one before the court.

In Miller v. Stewart, Mr. Justice Washington stated, by way of illustration, that if the obligee, by a subsequent agreement with his debtor, the principal obligor, agree with him to enlarge the time stipulated in the bond for payment or performance, even for a day, and upon the terms of the principal paying up a part of the debt immediately and giving additional security, both of which conditions are manifestly advantageous to the surety, by diminishing his responsibility, still if such agreement received not the sanction of the surety, he is discharged, upon the ground that, the terms of the contract to which he was bound being changed without his consent, it is a different contract from that which he engaged to guaranty, and consequently not his contract.

In Mackay and McDonald v. Dodge and Mackay, Survivors, etc., the Supreme Court of Alabama say: "It is not, however, necessary that it should appear that the surety has been injured necessarily by the alteration, nor would it make any difference if it was evident he was to be benefited by it. It is a sufficient answer that it is not the contract for the performance of which he was surety."

The case of Whetcher v. Hall affords a striking example of the tenacity with which this rule is adhered to. The facts were that the defendant was surety for another to the plaintiff, for the milking of 30 cows, at £7. 10s. each, per annum. Subsequently an agreement was entered into, without the consent of the surety, that the hirer was to have 28 cows for one-half of the year, and 32 for the remainder. The court held that it was a new bargain, which was not binding on the surety, who had a right to insist on a literal performance of the contract; that there might be but little difference between the two contracts, but that the true question was whether the contract sought to be enforced against the surety was the one for the performance of which he was bound.

Judge Ormond thinks that this case may have been pushed to the very verge of propriety. He nevertheless very properly adds that it places in a strong point of view the inflexibility of purpose with which the rule that no change shall be made in the terms or mode of performance of a contract, without consent of the surety, is adhered to by the courts.

But, while the learned judge who decided this case concedes the rule, he holds that it is in the power of the principal to accept of something less than was stipulated to be done by the other party, without consulting the surety, and that this is in fact no new agreement, but a continuance of the original bargain.

But we hold it to be the duty of the obligee to aver and prove the performance, not substantially, but literally, of the original agreement. It is a condition precedent to his right of recovery. But the court held

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otherwise, both by its decision upon the demurrer to the declaration and its charge to the jury.

2. If I covenant with an individual that, in consideration that he will lease me 800 acres of land, to be used for cutting stocks to supply a sawmill, I will allow him so much lumber as rent, and I subsequently accept of a less quantity, i. e. 680 acres, is not this necessarily a new contract? And does it require any other stipulation in order that it shall take the place of the original bargain? Is it not substituted by legal implication? If the principal may accept 680 acres in the present case, why not 100 or any other quantity? And if he could alter the contract, by waiving the fulfillment in this particular, why not in any other? Shall it be left to the other parties, or even to the courts, to determine whether the alteration is to the benefit or prejudice of the surety? Better, in this state especially, where everything has been done which the ingenuity of the Legislature could devise to protect sureties, to adhere rigidly to the rule that where any alteration is made in the contract, whether by a new agreement, either express or implied, and although the situation of the surety may not thereby be made worse, that still he shall be discharged.

Ideo consideratum est, that the judgment below be reversed.

3. As to the question of notice, we think the law was properly submitted to the jury.[42]

HARPER v. NATIONAL LIFE INS. CO. OF MONTPELIER, VT.

(Circuit Court of Appeals of the United States, Third Circuit, 1893. 17 U. S. App. 48, 56 Fed. 281, 5 C. C. A. 505.)

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

WALES, District Judge, delivered the opinion of the court.

This was an action, brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, against William V. Harper as principal, and Alexander Harper and Benjamin W. Blakeley, as sureties of said William V. Harper, on their joint and several bond in the penal sum of $20,000, dated November 19, 1888, and given

[42] Accord: Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731 (1893), ante, p. 82.

If a surety is discharged by a material alteration of the contract, he may nevertheless waive the alteration, and then will become bound. In some jurisdictions the waiver must be supported by a fresh consideration. Warren v. Faut's Trustee, 79 Ky. 1 (1879). But in others no new consideration is required. Pelton v. Prescott, 13 Iowa, 567 (1862).

On alteration of a writing contrasted with variation by a new agreement, see note and cases cited in 21 H. L. R. 63.

On failure of owner to insure premises as provided in builder's contract, operating to discharge surety, see note, 18 H. L. R. 626.

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to the National Life Insurance Company of Montpelier, Vt. Process was served upon the sureties only, and there was no appearance for William V. Harper. The recitals and condition of the bond are as follows:

"Whereas, in and by a certain agreement in writing by and between the said National Life Insurance Company and said William V. Harper, bearing date the 28th day of July, 1888, said Harper was appointed the general agent of said company for the states of Maryland, Virginia, Delaware and the District of Columbia, and did agree to perform as such general agent for said company certain duties in the said agreement specified;

"And whereas, the said National Life Insurance Company is also about to advance the sum of fifteen thousand dollars as a special loan to the said William V. Harper, at the request of all the parties hereto and upon his promissory note for that amount, dated November 19, 1888:

"Now the condition of this obligation is such that if said Harper shall and do well and truly comply with all the terms, conditions and covenants contained in said agreement on the part of said Harper to be kept, done and performed, and shall account for and pay over to said company, when and as required by said company, all commissions arising to him the said Harper under said contract, save only the sum of two hundred and fifty dollars ($250) per month, and shall also pay over when and as received by him the whole renewal interest due said Harper by the Equitable Life Assurance Society of the United States, (it being expressly guaranteed and agreed by said Harper that the money so paid over by him in each month shall not be less than the sum of five hundred [$500] dollars), and shall also pay or cause to be paid to said company all balance of indebtedness that may be due and owing to said company by said Harper upon any termination of said above recited agreement, or upon said promissory note of fifteen thousand dollars as hereinabove recited, or for any other indebtedness between said parties, and shall and will in all respects save, indemnify and hold harmless said company of, from and against any and all loss, cost, damage or expense by reason or on account of any default or failure on the part of said Harper so fully to perform all the conditions hereof without fraud, or further delay, then this obligation to be void; otherwise to be and remain in full force and effect."

At the trial it was proved that William V. Harper, the principal in the bond, became indebted to the insurance company, on a shortage in his accounts as its agent and the non-payment of his promissory note, in a sum of not less than $30,000. This indebtedness was not denied, but the sureties claimed that they were not liable for the default of their principal because of certain acts done by the insurance company without their consent, subsequent to the date of the bond: First, in changing the rates of commission to be allowed to William V. Harper, as provided for in the agreement of July 28, 1888; and,

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second, in giving an extension of time to the said Harper for the payment of his indebtedness to the company. The learned judge of the Circuit Court charged the jury that the evidence did not sustain either branch of the defense, and instructed them to find a verdict for the plaintiff. Eleven assignments of error have been filed, but all of them may be substantially embraced in two, which will be noted in their order.

On April 6, 1889, a supplemental agreement was entered into by the insurance company and William V. Harper, by which certain changes were made in the rates of commissions to be allowed him "on all new business and its renewals written on and after April 15, 1889." The average result of these changes was rather favorable to the agent, unless the new business should be limited to a particular sub-class of life policies. It was contended on behalf of the sureties that any change in the agent's compensation, made without their consent, discharged them; and a fortiori would they be entitled to their discharge if the effect of the change increased their risk. In support of this proposition it was argued that, as all the commissions allowed to Harper, over and above $250 per month, were to be paid over to the company in reduction of his note, any change in the rates by which the amount of the commissions would be reduced would increase the balance of his indebtedness and thus increase the risk of his sureties. It is true that, under the original agreement between the company and their agent, the former reserved the right to offset against his commissions any debt due or owing to them from him, but there is nothing in the agreement, or in the conditions of the bond, which can be construed to mean that the company was obliged to compel the appropriation of the agent's commissions to the payment of his debt. It was optional with the company to make such appropriation or not, but it was the duty of the agent to pay over the excess of the commissions "when and as required by said company."

The amount of commissions earned by the agent, whether large or small, would depend on his industry in soliciting and obtaining premiums on policies of insurance; but he was at all times bound by his agreement and by the conditions of the bond to account for the premiums and to pay the loan of $15,000. The omission or neglect of the company to require its agent to pay over the excess of his commissions did not deprive it of the right to compel him to account for the premiums, and to pay the balance of his indebtedness; nor does such omission or neglect exonerate his sureties. There is no stipulation in the original agreement, or in the bond, that the agent's compensation should remain fixed and unaltered. Commissions were allowed to him in the place of a stated salary in order to stimulate his services in soliciting business for his employer. The condition in the bond that he should comply with all the terms and covenants in the recited agreement, and the further condition that he should pay all balance of indebtedness, are separate and distinct conditions, and neither of these

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conditions was intended to be governed or affected by the rates of compensation allowed to him at the date of the bond, or afterwards.

The obligation of a surety is supposed to be a gratuitous one, in consequence of which he has been held liable on his bond only when its terms have remained inviolate. If there has been a material change in the contract of suretyship, the surety will be released; but, as it was pertinently said, in United States v. Hodge, 6 How. 279, 283, 12 L. Ed. 437: "The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured." In Benjamin v. Hillard, 23 How. 149, 165, 16 L. Ed. 518, the court said that in order to discharge a surety there must be another contract substituted for the original contract, or some alteration in a point so material in effect as to make a new contract, without the surety's consent.

As to the effect produced by a change in the compensation of the principal in a surety bond, the rule is thus stated in Brandt on Suretyship and Guaranty (1878) § 341: "Where the compensation which shall be paid the principal in an employment is not a part of the contract of the surety for his good behavior therein, a change in the amount of such compensation, which does not change the duties of the principal, nor vary the risk of the surety, does not generally discharge the surety."

An instructive illustration of this rule is found in Amicable Mutual Life Insurance Company v. Sedgwick, 110 Mass. 163. There the insurance company had appointed an agent to be paid by certain commissions, with a guaranty by the company that the commissions should amount to a specified sum monthly. The agent gave bond for the faithful performance of his duties. The sureties in the bond knew of the terms of the appointment of their principal when they became bound. Subsequently the agent and the company agreed that the agent should receive increased commissions, but give up all claim on the guaranty. It was held that the sureties were not thereby discharged, the new agreement did not affect the identity of the office nor the duties of the agent, he was not an agent at a fixed salary either before or after the new agreement, and there was nothing in the bond or in the letter of appointment importing that the guaranty as to the amount of commissions should prevent the company from withdrawing from the contract of guaranty if it proved burdensome. The effect of the change was therefore to continue the same appointment, requiring the same duties as before, but at what might prove a reduced compensation or an increased one, according to the amount of business done. There was no evidence that the change as to remuneration subjected the sureties to any greater or other risk than they intended to assume.

In Frank v. Edwards, 8 Ex. 214, where the salary of an officer had been reduced, the court refused to discharge his sureties, on the ground

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that, if the sureties had considered the amount of the salary to be an essential ingredient in the contract, they should have had a stipulation inserted in the condition of the bond that they would be liable only so long as the officer was continued at the same salary.

Applying these principles to the evidence in the present case, it is clear that there was no error in the instruction given to the jury that the supplemental agreement of April 6, 1889, did not discharge the sureties.[43] * * *

Affirmed.[44]

ZIMMERMAN v. JUDAH.

(Supreme Court of Indiana, 1859. 13 Ind. 286.)

Appeal from the Marion Circuit Court.

PERKINS, J. Suit upon a promissory note for $2,000, dated October 13, 1855, given by C. H. Brown, with C. Zimmerman as surety, to Samuel Judah, payable one day after date.

It appears by the answer of the defendant, Zimmerman, that at the same time that this note was executed, Judah and Brown entered into a contract by which Brown was to erect for Judah a certain building, to be wholly completed ready for occupancy by the 1st day of November, 1856. The agreement fixes the amount to be paid, the time of payment, etc. The last clause of the agreement is as follows:

"(5) As to the balance, $2,000, it is agreed as follows: Said Judah herewith advances to said Brown, as and for a loan on a note payable one day after date, the said sum of $2,000, which note shall be satisfied by the completion of said building as in this contract is provided, and which note, also, shall not become or be payable so long as said Brown shall progress with the preparation of materials, and with the erection of said building, so as to warrant the said superintendent in the reasonable expectation of the progress and completion of the work, as is hereinbefore provided. October 13, 1855.

"[Signed] Charles H. Brown.
"C. Zimmerman (Surety).
"Samuel Judah."

It thus appears that the $2,000 specified in the note sued on was substantially a penalty. If the building was proceeded with and completed according to contract, the $2,000 note was never to be paid. If not, it was to be paid.

The answer further shows that on the 5th day of June, 1856, the following further agreement was made without the knowledge or consent of Zimmerman, viz.: That said Brown and one Stokes should,

[43] A portion of the opinion, dealing with the question whether a binding extension of time was given, has been omitted.

[44] Accord: Sanderson v. Aston, L. R. 8 Ex. 73 (1873), variation in time of notice to terminate the contract.

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by the 1st day of November, 1856, put an additional story on the building then under contract between Brown and Judah, for the further consideration of $1,700, to be paid on the completion thereof.

The answer claims that this agreement was such an alteration of the original agreement as discharged Zimmerman, the surety.

The plaintiff demurred to the answer, the court sustained the demurrer, and the plaintiff had judgment.

The record discloses nothing by which we can determine whether the contracts for erecting the building were fulfilled or not. The inference from this second contract is that the execution of the first had satisfactorily progressed up to the 5th of June, 1856. And there is another letter from Mr. Judah, set out in the answer, dated September 10, 1856, which admits due exertion on the part of Brown in the execution of his undertaking. But the decision of the case here must rest on the single point as to whether the second contract above set out was such an alteration of the first as to discharge the surety for the performance of it; and we thus conclude:

The second contract required an additional story to be put upon the building. The building could not be finished under the first contract until after that story was put on, as it could not, till after that, be roofed. That contract did, therefore, increase the difficulty and expense of, and tend to delay the completion of, the first contract, and did, therefore, materially affect its execution, though it states that it is not to do so. It, in fact, made Zimmerman surety for the completion by the 1st of November, 1856, of the walls of the additional story provided for by the second contract. See Chit. on Cont. 529, 530; Ind. Dig. 703.

PER CURIAM. The judgment is reversed with costs. Cause remanded, etc.

WOODCOCK v. OXFORD & W. RY. CO.

(High Court of Chancery, 1853. 1 Drew. 521.)

On the 8th of June THE VICE CHANCELLOR delivered judgment.[45]

After stating the facts his honor continued:

Now it is contended by the plaintiffs that all these circumstances put together—first, the transfer of the contract to Williams & Marchant; then, the company dealing with Williams & Marchant as they did, entering into arrangements with them, altering the contract, the time at which it was to be carried into effect, the terms and mode of payment to the contractors—all these circumstances, they say, bring this case within the principle that, if a creditor so deals with his principal debtor as to alter the position of the surety, he discharges the surety.

[45] The facts sufficiently appear in the opinion. The statement of facts and the arguments of counsel, together with a portion of the opinion, are omitted.

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But, as the defendants' counsel suggest, that principle applies only when the transaction is without the concurrence of the surety; and the plaintiffs have felt the importance of that ingredient in the matter, that it must be without the concurrence of the surety; for the bill contains again and again passages charging that the sureties knew nothing of the transaction—were neither parties nor privies to any of the transactions subsequent to the giving of the bond. The whole of the equity of the bill is founded upon that.

Now, from the answer, and not merely by the statements of the answer, but by correspondence referred to, this appears: Woodcock & Part, being in partnership as solicitors with Scott, the firm being Woodcock, Part & Scott, were solicitors for Williams, Ackroyd & Price. They prepared the contract and the bond. They continued to be the solicitors of the contractors when Ackroyd and Price withdrew, and Marchant was substituted. They continued to act as the solicitors of Williams & Marchant. They were the solicitors who assisted in the preparation, if not of every one, at least of most, of the subsequent instruments, and, to show beyond doubt that the allegations of the bill, as to the transactions having taken place without the knowledge or concurrence of the sureties, have no foundation, correspondence is set out between the firm of Woodcock, Part & Scott, as solicitors for Williams & Marchant, with the company, on the subject of the arrangements by which all the matters in difference under the first submission were referred to the arbitration of Mr. Brunnel, and by which the company adopted Williams & Marchant as contractors, and dealt with them as such, being the very arrangements which the plaintiffs say discharged them.

Under these circumstances, without going any further, I think the equity claimed by the bill rests on allegations wholly unfounded in fact. It does not rest merely on the statements of the answer, but it appears by the correspondence, not only that the transactions on which they rely for their discharge were known to the plaintiffs, but that they assisted, as the solicitors of the principal debtor, in the preparation of instruments for carrying into effect the arrangements of which they complain. I must therefore dissolve the injunction. * * *[46]

[46] Accord: Owens v. Tague, 3 Ind. App. 245, 29 N. E. 784 (1892), holding that, where a surety is discharged by the alteration of an instrument, his subsequent assent to the alteration requires no new consideration.

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TAYLOR v. SCOTT et al.

(Supreme Court of Georgia, 1878. 62 Ga. 39.)

BLECKLEY, Justice.[47] 1. Where the evidence is in salient conflict, as in this case, we must look to the verdict to see which side gave the true version of the transaction. Taking the facts as the evidence for the defendants presents them, the sureties both signed on the faith of the creditor's promise, made to one of them and by him communicated to the other, that he, the creditor, would apply the principal debtor's crop of the current year to these particular notes. As between the sureties and the creditor this promise was a part of the consideration of the contract of suretyship. Jones v. Keer, 30 Ga. 93; Matheson v. Jones, Id. 306, 76 Am. Dec. 647. Moreover, each of the notes, by its terms, was a crop lien upon the whole of said crop; and these notes were the first, and therefore the highest, incumbrance which the record discloses to which the crop was subject. The very face of the papers which the sureties signed appropriated the crop to these obligations, and it was not in the creditor's power to change that appropriation without the consent of the sureties. Ross v. Saulsbury, 52 Ga. 380. See, also, Atlanta Nat. Bank v. Douglass, 51 Ga. 205, 21 Am. Rep. 234. The crop was of sufficient value to pay all the notes, and the principal debtor delivered it to a partnership of which the creditor was a member. The partnership appropriated it to prior liens of like kind in their favor, except a small surplus, which, through them, reached this creditor and was applied on these notes. In our opinion the sureties were discharged.

2. It seems to us that the creditor cannot put off the sureties with the excuse that the prior liens were not taken by him, but by the partnership for advances which the partnership furnished to produce the crop, and that delivery of the crop was not made to him, but to the partnership. He had stipulated with the sureties that the crop should go to their protection; and as a partner he should not have entered into an arrangement with the debtor which conflicted with his prior obligation, as an individual, to the sureties.

Judgment affirmed.

HILLIBOE v. WARNER et al.

(Supreme Court of North Dakota, 1908. 17 N. D. 594, 118 N. W. 1047.)

Appeal from District Court, Bottineau County; Edward T. Burke, Special Judge.

Action by P. S. Hilliboe, as administrator of the estate of Elias Ertresvaag, deceased, against N. J. Warner, W. R. McIntosh, and

[47] The facts sufficiently appearing in the opinion, the statement of them has been omitted.

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others. Judgment for McIntosh and such others, and Hilliboe appeals. Affirmed.

MORGAN, C. J.[48] The plaintiff, as administrator of the estate of E. Ertresvaag, deceased, brings this action against the defendants to recover damages for the alleged breach of a bond given by them for the faithful performance of a building contract between Ertresvaag in his lifetime as the owner of the building and the defendant N. J. Warner, the contractor. The other defendants are sureties upon said bond.

The complaint alleges the execution of the bond and the purposes for which it was executed. * * * The plaintiff demands judgment against the said Warner and against the sureties for the sum of $2,687, besides costs. The defendants, except Warner, answered. The sureties by their answer interpose nine defenses to the complaint. The principal defense relied upon is that the bond was materially altered after its execution by them, and that, by such alteration, the contract was changed and their liability increased by reason of such changes. * * *

A jury was waived and the issues were submitted to the court for determination. After taking testimony, the trial court made findings of fact and conclusions of law in favor of defendants, and ordered the action dismissed as to the answering defendants. Judgment was entered pursuant to such findings, and the plaintiff has appealed from such judgment, and assigns numerous errors in respect to the sufficiency of the evidence to sustain the findings and in respect to errors in the admission of evidence. * * *

The record shows that the name of Woods was upon the bond by evidence which is sufficient to sustain the findings of the trial court, and the finding in respect to the matter of the signature of T. F. Woods is as follows: "That said bond was first signed by N. J. Warner, the next by one T. F. Woods, and then by the other sureties, and that at the time the defendants other than the said N. J. Warner signed said bond the name of T. F. Woods was attached thereto as one of the sureties; that the name of said T. F. Woods was erased from said bond, and his liability as surety thereto canceled, after the defendants, other than N. J. Warner, had signed said bond, and without the knowledge or consent of said sureties, and that said erasure was made by and on behalf of said E. Ertresvaag." * * *

It is not seriously disputed by the appellant on this appeal that the erasure of the name of Woods from the bond is a complete defense to the other sureties who signed the bond after said Woods had signed the same and before his name was erased. In this case there was no agreement as to the number of sureties that should sign the bond, nor as to who the sureties should be. It is claimed that the erasure of the

[48] The opinion has been abridged by omitting the summary of the pleadings and the discussion of the admissibility of certain evidence.

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name under such circumstances changed the implied contract of contribution among the sureties, and that the sureties who signed the bond after said Woods had signed the same as a matter of law signed it on the understanding that Woods would be liable to them in contribution should they be required to pay the bond. In other words they signed it, relying upon Woods' responsibility, and that the erasure was therefore a material alteration of the bond.

In these contentions we concur. In two cases the principle has been adopted by this court. Cass Co. v. American Exchange Bank, 9 N. D. 263, 83 N. W. 12; Id., 11 N. D. 238, 91 N. W. 59. It is claimed by the appellant that there is no evidence in the record that the erasure was made by Ertresvaag or by his authority or with his consent. There is no direct evidence bearing upon this question. It appears, however, that the bond was in the custody of Ertresvaag, and this fact, together with the fact that the action is not brought against Woods, is sufficient prima facie to sustain the finding that the erasure was made with the consent of Ertresvaag.

In view of these conclusions, it is unnecessary to consider the other defenses raised by the answer.

The judgment is affirmed. All concur.[49]

JACKSON et al. v. COOPER.

(Court of Appeals of Kentucky, 1897. 39 S. W. 39, 19 Ky. Law Rep. 9.)

Action on a note by Joseph Jackson, guardian, etc., against William Cooper. There was a judgment for defendant, and plaintiff appeals. Reversed.

BURNAM, J. This suit was instituted upon a note for $979.12, purporting to have been executed to the plaintiff Jackson, as guardian, by John Bobbitt and appellee, William Cooper. The note, after the execution, was assigned to the plaintiffs Barnett and Trimble, to indemnify them as securities upon the guardian's bond of Jackson, executed by Jackson as guardian of the children, for whom the money was obtained for which the note in contest was executed. The original answer of the appellee sets up a plea of non est factum, but at the next term of the court the appellee offered to file an amended answer, in which he admitted he signed the note in contest, but averred that he signed it as surety for Bobbitt, and that the word "guardian" did not appear in the note, and that this word was inserted after

[49] On alteration of contract, either before or after breach, see 2 American Leading Cases (5th Ed.) 432, Hare & Wallace's notes on United States v. Howell, 4 Wash. C. C. 620, Fed. Cas. No. 15,405 (1826).

See Ellesmere Brewing Co. v. Cooper, L. R. 1 Q. B. Div. 75 (1896) where one surety, who signed but not in accordance with the amount of liability mentioned in the bond as assumed by him, thereby rendered the bond unenforceable against all the sureties who had signed.

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he delivered same, and without his knowledge or consent, alleging that this was a material alteration, and released him from liability. The appellant objected to the filing of this amendment, which the court overruled; and he also filed a demurrer to same, which the court, being advised, overruled, and to this ruling of the court the appellant excepted.

We are of the opinion that the court was correct in overruling the demurrer to the amended answer. The contract by which a surety becomes bound upon an obligation is voluntary, and without having any view in prospect of gain. It is an act of kindness to the obligor, and a convenience to the obligee, and of use to both; and the former should be dealt with with absolute fairness, and in a spirit of the utmost good faith. "It is a universal rule that where a contract, the performance of which has been guaranteed by a surety, has been altered or modified or changed without his consent, that he is discharged from liability on the contract; and whilst the alteration must be in some material point, yet very slight change in the contract is sufficient to discharge the security." In this case the addition of the word "guardian" changed entirely the character of the payee in this obligation. A security might be perfectly willing to sign a paper to a party as an individual, who would not be willing to sign it for a party in a fiduciary capacity. In a paper of this sort, which was non-negotiable in its character, he would have had the right of set-off or counterclaim against the note, if same had been taken in the name of the payee as an individual, while, taken to him as a fiduciary, his relations were altogether changed. We think this was undoubtedly a material alteration of the note, which would have resulted in discharging the security on same, if true.[50] * * *

For the reasons indicated, this cause is reversed, and is remanded for proceedings consistent with this opinion.

SECTION 4.—EFFECT OF CONNIVANCE AT BREACHES OF PRINCIPAL'S DUTY, NOT AMOUNTING TO DISHONESTY

SANDERSON v. ASTON.

(Court of Exchequer, Hilary Term, 1873. L. R. 8 Exch. 73.)

Declaration on a bond given by the defendant to the plaintiff, the condition of which recited that, by an agreement of even date, the plaintiff had agreed to admit into his service, as clerk and traveler,

[50] The remainder of the opinion has been omitted.

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one John Thomas Johnson, upon Johnson's obtaining two sureties "for his duly and faithfully accounting to the plaintiff, his executors, etc., and other the person or persons who should or might become partners with the plaintiff in his business of a lead, glass, and color merchant, in manner thereinafter mentioned, and for his faithful and honest conduct during the time of his continuance in the said service"; the condition of defeasance being that Johnson should from time to time, and at all times, well and satisfactorily account for and pay over and deliver to the plaintiff all and every sum and sums of money, etc., which he should receive for the use of the plaintiff or the plaintiff and any person who might become his partner, and the breach alleged being that Johnson did not well and satisfactorily account for or pay over, or deliver to the plaintiff, or to the plaintiff and his partner, certain sums of money (amounting to £84. 9s.) received by him for the use of the plaintiff and his partner during his service with them.[51] * * *

[Defendant's third plea alleged:]

(3) On equitable grounds, that Johnson, before the commission of the said defaults, had committed during the said service divers other defaults of the same kind, and that the plaintiff, though well knowing the said last-mentioned defaults, wholly omitted and neglected to inform the defendant thereof, and, notwithstanding the said last-mentioned defaults, continued to employ and retained Johnson in the said service, and that the defaults alleged were committed by Johnson during the said continuance and retention of him by the plaintiff in the said service.

Demurrers and joinder.[52]

KELLY, C. B.[53] * * * But the third plea raises a different question. The case of Phillips v. Foxall, L. R. 7 Q. B. 666, clearly shows that, if any defaults or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him. The question therefore is whether the allegation of the plea shows such breaches of duty as would have entitled the plaintiff to dismiss Johnson, and would, therefore, have entitled the surety to call upon him to do so. It is said that no dishonesty is shown by the plea. That may well be; and yet the employed, by failing to pay over money which he has received, may commit a breach of his duty, which would entitle his employer to dismiss him. Now we must take it on the plea, reading it with the declaration, that Johnson had received for the plaintiff certain sums of money which it was his duty to pay over,

[51] The second plea, relating to the variation of the contract, has been omitted.

[52] The arguments of counsel are omitted.

[53] Only so much of the opinion is printed as relates to the question of concealment of the principal's defaults.

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and which he did not pay over, and the question is whether that is not prima facie a breach of duty which would entitle the plaintiff to dismiss him. I am of opinion that it is, and that it is sufficient if the plea raises such a prima facie case.

MARTIN, B. I think the third plea is good on the authority of Phillips v. Foxall, L. R. 7 Q. B. 666. * * *[54]

PIGOTT, B. * * * As to the third plea, I agree that it is good for the reasons already given.

POLLOCK, B.[55] I also agree that the third plea is quite within Phillips v. Foxall. * * *

Judgment for * * * the defendant on the demurrer to the third plea.[56]

SECTION 5.—NEGLECT OF CREDITOR TO UTILIZE MEANS OF PAYMENT

FEGLEY et al. v. McDONALD.

(Supreme Court of Pennsylvania, 1879. 89 Pa. 128.)

Error to the Court of Common Pleas No. 3 of Philadelphia County; of January Term, 1876, No. 253.

Joseph McDonald became surety for one Rose, as treasurer of Stephen Girard Lodge, No. 450, A. Y. M., giving to the lodge, with Rose, a joint and several bond, with warrant of attorney, in $1,000, for the faithful performance by Rose of the duties of his office. Judgment was entered thereon June 25, 1874, which judgment was subsequently opened as to McDonald, who was let into a defense.

At the trial, before Finletter, J., it appeared that Rose was ordered by the lodge, on February 28, 1874, to pay the Grand Lodge, F. & A. M., the sum of $920, the amount of rent and dues owing for the year 1873. Rose made no attempt to obey the order of the lodge until May 27, 1874. On that day, after 3 o'clock, he sent his personal check for $920 to the secretary of the Grand Lodge, drawn on the

[54] Only the portion of the opinion is printed relating to the third plea.

[55] Only the portion of the opinion is printed relating to the third plea.

[56] Accord: Confederation Life Ass'n v. Brown et al., 35 Nova Scotia, 94 (1902).

Contra: Watertown, etc., Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196 (1881); Pittsburg, etc., Ry. Co. v. Shaeffer, 59 Pa. 350 (1869); obiter, Bank v. Tumbler Co., 172 Pa. 626, 33 Atl. 748 (1896).

In Murry's Estate, 3 Pa. Dist. R. 278 (1894), the Philadelphia orphans' court attempted to restrict Pittsburg Ry. Co. v. Shaeffer to cases of employment by corporations.

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Union Banking Company of Philadelphia. This check was not presented until June 4, 1874, when it was dishonored. On the day the check was given, Rose had no funds in bank to meet it; but the next day, May 28, 1874, he deposited the amount of the check to his individual account in the Union Banking Company. The funds so deposited, however, had been appropriated by said bank, June 4, 1874, before the check was presented, to pay a note then due, indorsed by Rose, which the bank had discounted for his benefit. The lodge was subsequently compelled to pay the said $920 to the Grand Lodge with accumulated interest. Rose never accounted to Stephen Girard Lodge for said amount, or paid any part of the same.

The court directed the jury to find for the plaintiffs, reserving the question of law as to whether McDonald, the surety, was discharged from liability on his bond to Stephen Girard Lodge by the delay of the Grand Lodge in presenting the check.

The verdict was for the plaintiffs.

Subsequently judgment was entered, by the court in banc, for the defendant on the point reserved.

The case was first argued in the Supreme Court on February 27, 1878, and, the court being equally divided (WOODWARD, J., being absent), the judgment was affirmed. A reargument was subsequently ordered.

Mr. Justice MERCUR delivered the opinion of the court, May 5, 1879.

The plaintiffs represent the Stephen Girard, a subordinate lodge of A. Y. M. The defendant was surety for one Rose, as treasurer of the lodge. The claim is against the surety for the alleged default of the treasurer. It appears that the Girard Lodge was indebted to the Grand Lodge for rent and dues in the sum of $920. Rose was, by resolution of his lodge, ordered to pay that sum to the Grand Lodge. After banking hours, on the 27th May, 1874, he drew his private check for that amount on the Union Banking Company, sent it to the secretary of the Grand Lodge, and received from him a receipted bill for the amount. It would appear that this sum of the plaintiff's money was either actually or constructively in the hands of the treasurer when he drew the check. The Grand Lodge omitted to present the check for payment until the 4th of June, 1874, although the bank and all the parties were located in the city of Philadelphia. When presented, payment thereof was refused by the bank; Rose having no funds there to meet it. The Grand Lodge retained the check for more than a year thereafter, when the Girard Lodge, without suit, voluntarily paid it. The latter now seeks to recover the amount thus paid out of the defendant as surety. There is no dispute about the facts. It appears that when Rose drew the check he had no funds in bank to meet it; but the next day he deposited the amount of the check to his individual account in the bank. The money so deposited remained there, subject to his check, until the 4th of June. On this day, but before the check was presented, the money

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was appropriated by the bank to pay another obligation of Rose which matured on that day.

The court directed the jury to find for the plaintiffs, reserving the question of law as to whether the defendant surety was discharged from liability on his bond to Stephen Girard Lodge by the delay of the Grand Lodge in presenting the check. Afterwards the court entered judgment in favor of the defendant on the point reserved. This is assigned for error.

The rule is well settled that when a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety is discharged. It need not be actually in the hands of the creditor, if it be within his control, so that by the exercise of reasonable diligence he may have realized his pay out of it, yet voluntarily and by supine negligence relinquished it, the surety is discharged. Commonwealth v. Vanderslice, 8 Serg. & R. 452; Ramsey v. Westmoreland Bank, 2 Pen. & W. 203; Everly v. Rice, 20 Pa. 297; Boschert v. Brown, 72 Pa. 372.

The question now before us is not in regard to the liability of Rose on the check, nor the validity of the claim against him. It is the right of the surety only with which we are now dealing. In contemplation of law the check was received by the Girard Lodge and paid to the Grand Lodge. On the first day after its receipt the money was in bank to meet it, and so remained there for one full week. If the check had been presented on any business day of the seven, it would have been paid, and the surety would have been discharged from all liability. It was given by Rose to discharge his liability to the Girard Lodge. If presented at bank in due time, it would have paid the demand against him. Then the responsibility of the surety would unquestionably have been discharged. If not discharged, it is solely through delay in the presentation of the check. Whether that delay was the immediate act of the Girard Lodge, which received it, or the act of the Grand Lodge, to which it was transferred, makes no substantial difference to the surety. The creditor had the means of payment in its own hands.

A check is generally designed for immediate payment, and not for circulation. It is the duty of the holder to present it for payment as soon as he reasonably may, and, if he does not, he keeps it at his own risk. The Girard Lodge accepted it as a payment from Rose. In like manner the Grand Lodge accepted it from the subordinate lodge. In order to charge the latter by reason of the non-payment, it should have been presented for payment within a reasonable time. Had it been so presented it would have been paid. A delay of seven days was an unreasonable time. While so holding the check unpresented, the Grand Lodge had no legal claim against the Girard, nor the latter against the surety of Rose. When it was presented and dishonored, it was too late for the Grand Lodge to cast the loss which it had sustained through its own default on the Girard, and for the latter, by volun-

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tarily paying the check, to impose a legal liability therefor on the defendant. The learned judge was right in entering judgment in favor of the defendant on the question reserved.

Judgment affirmed.[57]

VOSS v. GERMAN-AMERICAN BANK OF CHICAGO.

(Supreme Court of Illinois, 1876. 83 Ill. 599, 25 Am. Rep. 415.)

Appeal from the Superior Court of Cook County.

Mr. Chief Justice SHELDON delivered the opinion of the court.

This was a suit, brought August 18, 1874, upon a promissory note of which the following is a copy:

"Chicago, Oct. 4, 1873.

"Fifteen days after date we promise to pay to the order of the Germania Bank of Chicago three hundred dollars, at their office, with interest at the rate of ten per cent. per annum after due, until paid. Value received.

"[Signed] Albert Michelson.
"A. Voss.

Indorsed:

"Received on account, $72. November 21, 1873.

"Received on the within note, $25. July 28, 1874."

Upon trial in the court below, without a jury, the plaintiff recovered a judgment for $246.10.

The note appears to have been made for Michelson's benefit, and Voss to have been only a surety, as between himself and Michelson; and as Michelson is shown to have had funds on deposit in the bank, from time to time, after the maturity of the note, and before the bringing of the suit, to an amount exceeding that of the note, it is insisted the bank was bound to apply such funds to the payment of the note, and that, not having done so, Voss was discharged. And the cases of McDowell v. Bank of Wilmington and Brandywine, 1 Har. (Del.) 369, and Law v. East India Co., 4 Vesey, 824, are cited as authorities that, under such circumstances, a surety will be discharged.

Without remark upon or consideration of these authorities, we do not regard them as having application to the case in hand. We do not recognize, in such a case as is here presented, the existence of any such obligation as the one which is asserted by appellant's counsel.

It is further set up that there was an extension of the time of the payment of the note granted by the bank to Michelson, whereby Voss

[57] The creditor is under no duty, before suing the surety, to realize on the collateral given him by the principal. Daniel v. Vinson, 10 Tex. Civ. App. 439, 31 S. W. 421 (1895).

On duty of creditor to prove against estate of principal in bankruptcy, see note, 20 H. L. R. 502.

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was discharged. It is sufficient to say that we find no sufficient evidence of any binding agreement for such extension.

The judgment is affirmed.

Judgment affirmed.[58]

[58] The majority of American decisions are in accord with the principal case.

In Pennsylvania, the deposit of an indorser at maturity, though subject to application at the option of the holding bank, imposes no duty to so make application. Bank v. Peltz, 176 Pa. 513, 35 Atl. 218 (1896).

If the note is payable at the holding bank, and the drawer has funds there at maturity, there is a duty to the surety to make application. Commercial Nat. Bank v. Henninger, 105 Pa. 496 (1884), obiter; Home Nat. Bank v. Newton, 8 Ill. App. 563 (1881); German Nat. Bank v. Foreman, 138 Pa. 474, 21 Atl. 20, 21 Am. St. Rep. 908 (1891).

See note on "Banker's Lien" in 9 H. L. R. 146.

Where payment is made by the debtor, without designating to what debt application shall be made, the creditor may apply the payment to a debt antedating that guaranteed (Kirby v. Duke of Marlborough, 2 M. & S. 18 [1813]; Williams v. Rawlinson, 3 Bing. 71 [1825]), or even to one subsequently created (In re Sherry, 25 Ch. Div. 692 [1884]), without impairment of his rights against the surety.

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CHAPTER IX

TRANSACTIONS OF THE CREDITOR (OR PROMISEE) WITH SURETY

SECTION 1.—REQUEST OF SURETY TO CREDITOR (OR PROMISEE) TO SUE PRINCIPAL

CROUGHTON v. DUVAL.

(Court of Appeals of Virginia, 1801. 3 Call, 69.)

Duval filed a bill in the High Court of Chancery, stating: That he had become surety for Campbell in some bonds to Croughton. That the plaintiff had requested the defendant to sue Campbell, but never could prevail upon him to do so. That after Campbell's death the plaintiff solicited the defendant to take administration on his estate, and offered to be his security; but this also was declined. The bill, therefore, prays that the bonds may be delivered up. The answer denies any peremptory request to sue; but two witnesses prove the request, and one speaks of the probable ability of Campbell to have paid about that time. The court of chancery granted a perpetual injunction to any further proceedings on the said bonds; and Croughton appealed to this court.[1]

PENDLETON, President, delivered the resolution of the court as follows:

This is an appeal from the decree of the court of chancery, where Mr. Duval exhibited his bill, stating: That, on the 23d of April, 1793, he, as security for Mr. Alexander Campbell, entered into three bonds to Mr. Croughton, for £113. 4s. 4d. each, one payable in October, 1793, another in January, 1794, and the third in April, 1794, all bearing interest from October, 1790. That, Mr. Campbell's circumstances being in a declining state, Duval, in October, 1794, when all the bonds had become due, applied to Croughton, who well knew Campbell's circumstances, and requested him to bring suits on the bonds, which he declined doing, till after Mr. Campbell's death, insolvent, in 1796, his inducement for which forbearance was Campbell's being his counsel in an important suit then depending, and his expectation that Campbell would be able to pay him from the fruits of a suit, then depending in this court. That, after Campbell's death, Duval again applied to

[1] The arguments of counsel are omitted.

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Croughton to administer on his estate, by which the debts might have been secured; but he refused to do so, and Duval, not being a creditor, could not obtain such administration. That, in 1798, he received a letter from the appellant Southcomb, intimating his claim to the bonds, which he answered, assigning reasons against his liability. Croughton and Southcomb are made defendants, and required to answer the bill; and the prayer is that the bonds may be canceled so far as respects the plaintiff, or that other relief may be afforded.

The proofs fix the request to sue in 1794, but go no further. It is not proved that any new arrangements are made between the creditor and the principal to obtain a forbearance of the suits; for, although it is stated that Campbell expected to pay from the effect of a suit depending, it does not appear that Croughton had bound himself to wait till the event of that suit. It is, therefore, a naked case for the question whether a creditor, by delaying to commence suit, when requested by a surety, without anything done on his part which may amount to a new contract with the principal, shall lose his remedy against the surety. The question is new, and, indeed, important, as there may, perhaps, be hundreds of bonds, dated prior to the act of December, 1794 (Mar. 1795, R. C. [Ed. 1819] c. 116, § 6), existing in the state, and probably not one of them in which the creditor has not forborne to sue for a considerable time beyond the day of payment, which, it is urged, will amount to a discharge of the surety. It would, indeed, be much more important, if that act of 1794 had not settled the question from that period. The act does not take away any remedy which the surety was entitled to before; and we come to consider what that remedy was.

It is clear that the plaintiff might have paid the money, and proceeded to a suit himself, or, if that was inconvenient, he might have brought his bill of quia timet, to have compelled the principal to pay, and the creditor to receive the money; but that the creditor should lose his debt, because he was merely passive, in forbearing a suit which the surety requested him to bring, without anything active between him and the principal, tending to show a new contract for forbearance, is not, and the court believe cannot be, proved by any of the cases produced, or existing. In the case quoted, from 2 Bro. C. C. 579, the creditor commenced suit, and, upon the principal giving a note to confess judgment, agreed to stay execution for three years, which the Chancellor considered as a new contract and compromise with the principal, without the consent of the surety, and which deprived him of his remedy by the bill of quia timet, and, therefore, that the surety was discharged. In the case in 2 Ves. Jr. 540, the creditor took from the principal several notes and drafts, which were returned, and new ones given from time to time, which amounted to a new contract, and all this without consulting the surety, who had this further equity in that case, that while those notes were transacting, considering himself as discharged, he had paid over to the

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principal more money than the amount of the debt, which had come to the surety's hands; and the Chancellor adjudged that that surety was discharged. The circumstances discussed in those cases, so far from proving that the surety is discharged by a bare request to sue, not complied with, tend to establish the contrary, that such request and a bare forbearance to sue, does not amount to a discharge.

Sureties are so far favored in equity that the court will never extend relief against them further than, by their contract, they are bound at law; but fair creditors are also favorites in that court, and will not be deprived of their legal rights, without some fraud or neglect in doing what they were bound to do. It was certainly unkind in Croughton not to sue when he was requested by the surety, which was so far a breach of his moral duty; but it was truly said that this duty was such as the civilians describe as an imperfect obligation, the performance of which was merely voluntary, and could not be enforced by a court of justice, many instances of which were mentioned, and many more might have been added. The parties here had plain remedies: The creditor to sue, if he chose it; and, as he did not, Mr. Duval's remedy is before pointed out, which he, neglecting to pursue, was at least as much in fault as the creditor, and where equity is equal the law must prevail.

The decree is, therefore, to be reversed, with costs, by the unanimous opinion of the court; and, in consequence of Mr. Duval's consent, entered in the record, he is decreed to pay the several sums according to the bonds. The costs in that court to be equally borne by the parties, as it seems to have been by consent, to settle a new point.

TOWNSEND v. GAWEN RIDDLE.

(Supreme Court of New Hampshire, 1822. 2 N. H. 448.)

This was assumpsit on a promissory note, dated February 22, 1814, for $188.70, on demand, with interest. It was signed by the defendant and one John Riddle, as joint and several promisors.

At the trial in April here last, under the general issue, it appeared in evidence that the note was given for the sole debt of John Riddle; that the defendant was in fact a mere surety; that said John died some years since; that, his estate having been represented insolvent, commissioners were appointed, to whom the plaintiff exhibited this note; that the note was rejected or disallowed; and that he never claimed an appeal from their decision.

On these facts a verdict was taken for the plaintiff, subject to further consideration.

WOODBURY, J. The proceedings before the commissioners operated as a discharge of one of the joint and several promisors in the note

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now in suit. 1 N. H. Laws, 219. Death discharged the person of John Riddle; and no action can be instituted against his estate, when represented insolvent.

The first question, then, is whether a decision in favor of John Riddle's estate by the commissioners must, by operation of law, be deemed a bar to this action against the other promisor. When contracts are joint, any kind of discharge of one promisor on the merits of the contract is in law a discharge of all the promisors. 1 Lev. 63; 1 Sid. 76; 1 Bos. & Pull. 630; Cairns v. Smith, 8 Johns. (N. Y.) 339; Clason v. Morris, 10 Johns. (N. Y.) 538. Because the contract, once fulfilled, released or satisfied on its merits, should not again be enforced. But if the discharge do not relate to the merits of the contract, and only concerns the person of one of the promisors, as infancy, bankruptcy, etc., the other promisors are still holden. 2 Maule & Selw. 23, 444; Hartness v. Thompson, 5 Johns. (N. Y.) 160; Robertson v. Smith, 18 Johns. (N. Y.) 478, 9 Am. Dec. 227; Ward v. Johnson, 13 Mass. 151. "For," in the language of the Mirror of Justice (page 215), "satisfaction hath respect to the debt and not to the person."

Indeed, where the contract is joint and several, as in the present case, a judgment against one promisor, followed by a commitment to prison and a discharge of his person, which amounts to a technical satisfaction, does not operate as a satisfaction of the debt itself, and bar another action against another promisor, but operates merely as a formal or modal satisfaction in respect to the individual imprisoned. 3 Mod. 36; Yelv. 67, note; 5 Co. 86, Blumfield's Case; 2 Bos. & Pull. 62; 6 D. & E. 525; 6 Co. 46, a; 3 East, 255; Cro. Jac. 74, 338; 5 East, 147; 5 Bos. & Pull. 475; 4 D. & E. 825, McDonald v. Bowington; Bl. Rep. 1235, Hayling v. Mullhull; Chitt. Bills, 254; Livingston v. Bishop, 1 Johns. (N. Y.) 291, 3 Am. Dec. 330; 1 Gall. 32, Fed. Cas. No. 6,900, Hunt v. United States; Ward v. Johnson, 13 Mass. 151.

There would be little advantage in having two promisors, unless either could be prosecuted till the debt itself was actually satisfied. 2 Bl. Rep. 1235. Where the contract is joint, it would seem that, from some technical principle, a different rule prevails. Yelv. 68, b, note; Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215; Ward v. Johnson, 13 Mass. 148; 18 Johns. (N. Y.) 483, 9 Am. Dec. 227, Robertson v. Smith.

But in either case, where the judgment against one promisor has been actually satisfied by land, goods, or money, then of course no action can be sustained against the other promisors. Cro. Jac. 338; Strange, 515. Whether the commissioners disallowed this note, because it had been thus satisfied, or because it had been discharged as to the person only of John Riddle, does not appear. Cro. Jac. 187, Huscombe v. Standing.

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But, to bar this action, the grounds of their decision should appear, and should relate to the merits of the contract. As the present defendant was no party to the doings before the commissioners, and consequently not bound by them, he cannot bind the plaintiff by them; and if their decision rested on evidence of payment, illegality in the consideration, or some other such ground, it is the duty of the defendant now to prove it. 6 Cranch, 265, 3 L. Ed. 215, Sheehy v. Mandeville.

The defendant next contends that he was in fact only a surety in the contract, and ought now to be discharged, in full or in part, on account of negligence in the plaintiff respecting the principal debtor. The principal debtor was deceased; his estate was insolvent; these facts known to the plaintiff; his claim exhibited to the commissioners; and, after being rejected, no appeal from their judgment claimed and prosecuted. A neglect to appeal, it is said, has injured the defendant to at least the amount of the dividend, which would have been allowed had the claim been supported in the court of appeal.

But the ground on which the commissioners acted may, as before remarked, have concerned only the person of the principal debtor, and might have prevailed as well in the appellate tribunal as before the commissioners. Moreover, the doctrine at law concerning the discharge of sureties does not now go to the extent which the defendant apprehends.

By Magna Charta, c. 8: "Neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt." And in Fitz. Na. Br. p. 137, a writ is said to lie for sureties to protect them from distress while the principal debtor has anything. "We command you, that you distrain C. [the principal] to pay the said money, and that you thereupon permit his pledges to have peace," etc.

But in more modern times the surety is either by the terms of the contract liable at the same time and in the same manner with the principal, or by its terms, as in the case of indorsers of writs and bail, they do not become liable till judgment is obtained against the principal, and execution upon it is returned unsatisfied. In the last class of cases, if "distrained" or sued too soon, they can defend without resort to a remedial writ, as in Fitzherbert; in the other class, they are by the terms of their contract liable or not liable at the same time with the principal; and consequently, when sued before the principal, but after liable by their contract, they seem at law to be without remedy against the creditor, either by defense, by a separate writ, or otherwise. The safety to such sureties consists in their obtaining ample indemnity from their principals, or in making express provision in their contracts that the principals are to be first and diligently prosecuted. Accordingly it has been held that mere delay or forbearance to sue a principal debtor does not exonerate his surety.

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Poth. on Ob. 262; 1 Dod. Ad. Rep. 1, 7; James v. Mayrant, 4 Dessaus. (S. C.) 604; Dehuff v. Turbett, 3 Yeates (Pa.) 160; 1 Holt's N. P. 84; People v. Jansen, 7 Johns. (N. Y.) 338, 5 Am. Dec. 275; Fulton v. Matthews, 15 Johns. (N. Y.) 433, 8 Am. Dec. 261; Powell v. Waters, 17 Johns. (N. Y.) 176; Hunt v. United States, 1 Gall. 34, Fed. Cas. No. 6,900; 6 Taunt. 379.

At the same time it has been held that if this delay happens after an express request by the surety for an action to be instituted against the principal, and if thereby the surety has lost all benefit of any remedy over for the debt, he becomes exonerated. Pain v. Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415. But this position has in other cases been denied, and, though supported by some apparent equity, is on principle questionable. King v. Baldwin, 2 Johns. Ch. (N. Y.) 563.

Again, it has been held that if the delay happen under a new and distinct engagement between the principal creditor and the debtor, and the surety suffer by the delay, he ought to be discharged. 3 Atk. 96; 2 Ves. Jr. 540; 2 Brown's Ch. 529; Holt's N. P. 84, Orne v. Young; Rathbone v. Warren, 10 Johns. (N. Y.) 595; Fulton v. Matthews, 15 Johns. (N. Y.) 433, 8 Am. Dec. 261.

This last position seems on principle more tenable; and the decisions in favor of it, though mostly in chancery, do not profess to rest on any principles, not consistent with the common law, when the character of the surety is disclosed in the contract. People v. Jansen, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275; 2 Ves. Jr. 542; Holt's N. P. 84. Vid. etiam Hunt v. United States, 1 Gall. 33, Fed. Cas. No. 6,900; Rathbone v. Warren, 10 Johns. (N. Y.) 595; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; 6 Taunt. 379.

It deserves remark, however, that most of the cases above cited are those where the sureties were liable, not as joint or joint and several promisors, but as mere indorsers, or as guarantors on a separate instrument, in which cases it has been supposed that greater diligence and strictness are imposed on the creditor. 2 Taunt. 206; 8 East, 445; Lanuse v. Barker, 10 Johns. (N. Y.) 327; Rathbone v. Warren, 10 Johns. (N. Y.) 587. Where the character of the surety appeared on the face of the contract, and by law the creditor was obliged to make periodical settlements with the principal, and neglected it, the surety has been exonerated. People v. Jansen, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275; 1 Bos. & Pull. 419; 10 East, 40, Tr. River C. v. Harley.

On the points above mentioned, see, further, 18 Ves. 200; 6 Ves. 809; 2 Marsh. Rep. 91; 3 Binney, 520; 2 Hen. Bl. 613; Lanusse v. Barker, 3 Wheat. 155, note.

How far we should feel warranted in the adoption of any of the above positions to exonerate a surety need not be decided till a case arises, which requires an absolute expression of our opinion. But it is very certain that we should not go beyond all those positions; and

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it is equally certain that the present case comes within the principle of none of them.

Here the character of the defendant as a surety did not appear on the face of the contract, nor was it proved that the plaintiff knew him to be only a surety. Here he was not liable as a mere indorser on the same instrument, or as a guarantor on a separate one. No time for an adjustment with the principal was fixed by law; no delay was given to him after a request by the surety for a prosecution; no new engagement for forbearance appears to have been entered into between the creditor and debtor; and, though the remedy over by the defendant is now lost, yet, it was not after a request to prosecute, or an engagement to forbear. 15 Johns. (N. Y.) 433, 8 Am. Dec. 261, Fulton v. Matthews.

Perhaps a review or new trial might disclose new and important facts; but on the case as now stated there must be

Judgment on the verdict.

THOMPSON v. BOWNE.

(Supreme Court of New Jersey, 1876. 39 N. J. Law, 2.)

On error to the Monmouth Pleas.

Argued at June Term, 1876, before BEASLEY, Chief Justice, and Justices SCUDDER, DIXON, and REED.

The opinion of the court was delivered by

BEASLEY, Chief Justice. This was a suit against the two joint makers of a promissory note. The plaintiff in error was one of these makers, having signed the note as surety for his companion.

The objection to the trial, which is elaborately discussed in the brief of the counsel for the defense, is that the court overruled an offer to show that the defendant, as surety, gave notice to the holder of the note that he was required to sue the principal, and that such notice was disregarded, and the principal afterwards became insolvent. Numerous decisions in the courts of other states are cited in support of the validity of the objection.

But the question with us is not an open one. A series of judgments in this court and in the Court of Errors has entirely established the law in a manner opposite to this contention. The following are the cases: Pintard v. Davis, 20 N. J. Law, 205; Id., 21 N. J. Law, 632, 47 Am. Dec. 172; Grover v. Hoppock, 26 N. J. Law, 191; Morris Canal v. Van Vorst, 21 N. J. Law, 100; Freehold Banking Co. v. Brick, 37 N. J. Law, 307.[2] * * *

[2] The remainder of the opinion, holding that the mere passive conduct of the creditor does not discharge the surety, is omitted.

Accord: Hogaboom v. Herrick, 4 Vt. 131 (1832).

Smith v. Freyler, 4 Mont. 480, 1 Pac. 214, 47 Am. Rep. 358 (1882).

The New York doctrine to the contrary of the principal case (Pain v. Packard, 13 Johns. 174, 7 Am. Dec. 369 [1816]; King v. Baldwin, 17 Johns. 384, 8

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FIRST NAT. BANK OF BUFFALO, Respondent, v. WOOD, Appellant.

(Court of Appeals of New York, 1877. 71 N. Y. 405, 27 Am. Rep. 66.)

Appeal from judgment of the General Term of the Superior Court of the city of Buffalo, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought against defendant as indorser of certain promissory notes made by one Devenport and discounted by plaintiff. The defendant was an accommodation indorser, which the plaintiff knew when it discounted the notes.

The answer sets up that previous to the making of the notes Devenport had been a customer of the plaintiff, keeping a large account with it, and procuring loans and discounts of the plaintiff upon notes and other paper; that in 1869 Devenport made an arrangement for a line of discount with plaintiff to the amount of $4,000, and executed to the plaintiff a mortgage upon real estate to secure the payment of such discounted paper as he then owed the plaintiff, and such as should be hereafter discounted for him by the plaintiff, not exceeding $4,000 at any one time, and for all renewals or extensions of such paper, during the term of five years, from February, 1869; that the then existing debt of Devenport to plaintiff "was nominally and in form paid and retired by the assumed and pretended discount of" paper made by Devenport, or by him procured to be made and indorsed by others for his accommodation, the proceeds of which were credited him on plaintiff's books as an ordinary deposit; that the paper last mentioned was "nominally and in form paid" by the discount of other similar paper by plaintiff, which was credited on its books to Devenport as a deposit, against which he drew "for the purpose of going through the form of paying" the previous paper, his indebtedness to

Am. Dec. 415 [1819]) overruled Chancellor Kent's decision in King v. Baldwin, 2 Johns. Ch. 554 (1817).

See note to Pain v. Packard, 2 Am. Lead. Cas., 270, by Hare & Wallace.

The New York rule established in 1817 was due to the deciding vote of the Lieutenant Governor of New York, John Tayler, who was not a lawyer, but a quite prominent trader, banker, politician, and man of affairs. See G. A. Worth's "Random Recollections of Albany, 1800–1808." This New York doctrine was introduced into Pennsylvania in Wetzel v. Sponsler's Ex'rs, 18 Pa. 460 (1852), and subsequently the limitation was tacked on to this doctrine that there must be a notice to the effect that unless suit is brought the surety will hold himself discharged.

See the elaborate note to King v. Baldwin in 2 Hare & Wallace's American Leading Cases (5th Ed.) pp. 388 to 418.

The subject has been dealt with in various statutes. See Ames' Cases on Suretyship, p. 223; Moormann v. Voss, 77 Ohio St. 270, 83 N. E. 76 (1907).

Some American states by statute have provided that, after written notice by the surety to the creditor to commence action, non-compliance will discharge the surety.

Rev. St. Mo. 1845, p. 998, title "Securities," construed in Hickam v. Hollingsworth, 17 Mo. 475 (1853), not to apply where the principal is dead.

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plaintiff being about the same amount at all times; that this course of business continued for five years, until February, 1874, when Devenport, being largely indebted to plaintiff on the paper discounted for him under said arrangement, made another arrangement with the plaintiff, by which his line of discount was to be extended to $8,000, and he made a new mortgage to plaintiff upon the same real estate as the first, as security for his then existing indebtedness to the plaintiff, and for future discounts, to the extent of $8,000; that thereafter the plaintiff continued to discount for Devenport paper made or indorsed by others for his accommodation from time to time, the proceeds of which were credited him on the plaintiff's books, and used to take up other like paper which had been discounted for him by plaintiff; that the amount of his debt, though it may have varied from time to time, yet was not materially reduced; that the defendant, knowing the facts aforesaid, and relying on the security of said mortgages, indorsed the notes in suit at Devenport's request, and for his accommodation, without consideration, to be used by him in his dealings with the plaintiff; that said notes were "in form discounted" by the plaintiff, and the proceeds credited to Devenport on its books "as a mere colorable deposit of money," from which other paper, discounted previously for Devenport by plaintiff, was "in form paid and retired"; that, when said notes in suit were discounted, plaintiff knew that defendant was a mere accommodation indorser; that Devenport was insolvent, and known to plaintiff to be so, and he continued insolvent until his death; that said mortgages continued to be held by plaintiff, and are ample security for the payment of said notes and all other indebtedness of Devenport to plaintiff; that besides said notes a large amount of other paper has been discounted for Devenport by the plaintiff, upon which other persons are accommodation makers or indorsers for him, and which is unpaid, and is secured by said mortgages. The answer also alleges that the plaintiff, in the course of its dealings with Devenport, took and received, upon the discounts made for him as aforesaid, interest at the rate of 10 per centum per annum.

On trial the defendant, having proved the execution and delivery of the two mortgages, offered to prove the other facts so set up in his answer as a defense to this action; but the court decided that such facts did not prove or tend to prove any defense, or entitle the defendant to any relief, and excluded the evidence offered, to which ruling the defendant duly excepted. Defendant gave in evidence an instrument executed by him, releasing certain premises from the prior lien of a mortgage to him, so as to give a preference to the lien of one of the mortgages above mentioned, executed by Devenport to the plaintiff, upon the same premises, and offered to prove that prior to the execution of said instrument, and as part of the negotiation which resulted in its execution, and in consideration of the release therein contained, it was by parol stated and agreed by plaintiff that

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it would resort to said mortgage made by Devenport before suing defendant upon any note secured by that mortgage which defendant might indorse. This parol evidence was rejected by the court, on the ground that it would contradict and vary the terms of the instrument of release as well as the notes themselves.[8]

MILLER, J. The defendant was an indorser upon the notes in suit for one Devenport, who kept an account with the plaintiff, and had arranged for a line of discounts, which was secured by mortgages upon real estate. The defendant set up in his answer, and offered to prove, that he indorsed said notes for the accommodation of the maker, without any security or protection whatever, except such as was afforded by the mortgages above mentioned, which by their terms were executed and delivered as security for paper of this character; that the plaintiff had full knowledge of the character of the indorsement, and knew that the defendant relied upon the mortgages as the primary fund out of which the debt represented by the notes was to be paid; that the plaintiff did not actually lend or advance any money to the said Devenport on the pretended discounts of the said notes, or any of them, but they were passed to the credit of said Devenport as a mere colorable deposit of money, out of and from which other paper was in form paid and retired; and that the liability and indebtedness was a mere extension and renewal of the original indebtedness secured by said mortgage.

We think that the testimony offered established no defense to the action, and did not entitle the defendant to the equitable relief demanded by the answer. The defendant claims that the mortgage was the primary security for the indebtedness, and the notes mere collateral promises to pay the same debt or liability secured by a lien on the real estate, and no action can be maintained on the notes, but the remedy must be confined to the mortgage as the higher security. The authorities relied upon to sustain this position do not uphold the doctrine contended for in cases where commercial paper is discounted and collaterals taken to secure the same. The character of such paper is well understood, and it would be overthrowing long-established rules, seriously affecting the rights and liabilities of parties, to hold that resort must be first had to a mortgage or other instrument taken as a collateral to secure the same. In such cases the money is not loaned on the mortgage, but it is given merely to make the notes discounted more safe and secure, and according to the intention of the parties is not to be considered as the principal debt. Much embarrassment and perplexing complications would arise, if holders of such instruments, who had discounted paper upon the faith of such security, should be compelled to resort to the same primarily for the collection of their demands. It would in fact throw the burden of a litigation upon the party who was intended to be relieved

[8] The arguments of counsel have been omitted.

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from the same, and tend to thwart the purpose in view. We have been referred to no authority which upholds and sustains any such principle.

While an accommodation indorser may be regarded as surety in some cases and under certain circumstances, and has all the rights applicable to that relationship, yet as between him and a bona fide holder, where his liability has become fixed, he becomes the principal debtor, and if he desires the benefit of any security held by the creditor he must pay up the debt, fulfill the contract, and enforce the right of subrogation to the holder as to the securities held by him. See Ross v. Jones, 22 Wall. 576, 592, 22 L. Ed. 730; In re Babcock, 3 Story, 393, 398, 399, Fed. Cas. No. 393.

The indorser cannot compel the holder to sue the maker first, or to enforce his security, and in the absence of an additional and controlling equity to resort to a collateral security. The uniform current of authority fully sustains the views expressed, and most of the leading cases bearing upon the question discussed are so fully considered in the opinion of the General Term that, with perhaps some few exceptions, further examination of the cases is not required.[4]

* * *

Several cases are cited by the appellant's counsel, which were not especially considered by the General Term, to sustain the doctrine that a surety may compel the creditor to sue for and collect the debt of the principal debtor, or to exhaust his collateral before resort is had to the surety. Wright v. Austin, 56 Barb. 13; Soule v. Ludlow, 6 Thomp. & C. 24; Mathews v. Aikin, 1 N. Y. 595. In each of those there was some special equity or some agreement which took them out of the general rule herein before referred to, and which does not in any way interfere with the same. Under circumstances like those here presented, it can scarcely be claimed that the surety would be entitled to the enforcement of the rule contended for, without an offer on his part to pay the expenses which might necessarily be incurred by this course of procedure.

The remedy of the defendant, in accordance with the views expressed, clearly was to pay up the indebtedness to the plaintiff, thus asserting his right to be subrogated, and to take under his control and enforce the securities in question. The fact that other parties besides the defendant occupied the same position as he did, and were interested to the same extent or in a similar manner in enforcing the security, presents no valid objection to requiring that the defendant should adopt such a course; for he could only avail himself of such benefit as is really conferred by the securities, and that they are an advantage to some one else besides himself, does not impose upon the plaintiff the cost and expense of prosecuting them before bringing an action against the indorser. The defendant, in claiming the right of subrogation, can only take the securities as they ac-

[4] The opinion has been slightly abridged.

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tually are, with their burdens and advantages, and beyond this he has no rights and no valid claim for protection.

The offer of the defendant to prove the taking of excessive interest in the transactions between the plaintiff and Devenport, and a greater rate than is allowed by the laws of this state, was properly refused. The proposition embraced transactions with which the defendant was not connected, and therefore the offer was too broad and comprehensive. Had it been confined to transactions between the plaintiff and Devenport, with which the defendant was connected, and to the notes indorsed by him, a more serious and difficult question would arise; but in the form in which the offer was made the point raised is not in the case.

The alleged parol agreement in regard to the release, prior to its execution, was properly excluded by the court, for the reason that it would contradict and vary the terms of the release as well as the notes.

No other question raised demands discussion, and the judgment should be affirmed, with costs. All concur, except CHURCH, C. J., absent.

Judgment affirmed.[5]

SECTION 2.—NOTICE OF CREDITOR (OR PROMISEE) TO SURETY THAT CREDITOR (OR PROMISEE) WILL LOOK ONLY TO THE PRINCIPAL FOR PERFORMANCE

HARRIS v. BROOKS, Jr.

(Supreme Judicial Court of Massachusetts, 1838. 21 Pick. 195, 32 Am. Dec. 254.)

Assumpsit on the following promissory note: "Boston, August 16, 1832. For value received, we promise to pay Abel Parker, or order, five hundred dollars in thirty days and grace. Reuben Damon. Isaac Brooks, Jr." The note was indorsed by Parker, the payee.

At the trial, before Morton, J., the defendant introduced evidence tending to show that the note was in the hands of one Barnard from about the time when it became due until 1835; that it was an accommodation note, made for the benefit of Damon to enable him to raise money, or, if such was not the original agreement between Damon and the defendant, yet that is the result, Damon had received

[5] **Accord: Third National Bank of Malone v. Shields, 55 Hun, 274, 8 N. Y. Supp. 298 (1889); Sterne v. Talbott, 89 Hun, 368, 35 N. Y. Supp. 412 (1895).**

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the whole benefit of the note, so that the defendant had assumed the character of a surety; that soon after the note became due the defendant called on Barnard for the note, and said, if he had to pay it, he wished to attend to it soon, as he then could get security of Damon; that Barnard replied that Damon received the money on the note, he ought to pay it, and he (Barnard) would look to him for payment, and that the defendant need not give himself any trouble about the note, for he should not be injured.

Upon this evidence the judge instructed the jury that if the defendant was a surety, and this was known to Barnard when the above declaration was made by him, and if, in consequence thereof, the defendant omitted to take up the note and secure himself out of the property of Damon, he was legally discharged from his liability; and that the defendant might be deemed a surety, if the original agreement between him and Damon was that the note should be used for the sole benefit of Damon, or if it was subsequently agreed between them that he should have the sole benefit of the note, and he did in fact receive the whole proceeds of the note.

The jury returned a verdict for the defendant.

The plaintiff excepted to the above instructions. If the court should be of opinion that they were wrong, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

SHAW, C. J., delivered the opinion of the court.

We are now to take it as found by the jury, under the instructions given them, that for several years after this note became due, Barnard was the indorsee and holder of it; that as between the two promisors it was an accommodation note, that is, that the money raised upon it was raised for the benefit of Damon and went to his use; that this was known to the holder; that after it became due Brooks expressed a willingness to pay it, and, if he was to pay it at all, wished to pay it then, because he could then get security of Damon; and that the holder then verbally discharged him, and agreed to look to Damon alone, recognizing him as principal.

The court are of opinion that the instruction was correct, and that upon these facts the defendant was not liable.

It is very true that an agreement between two promisors of a note that the one shall take the whole of the proceeds and pay the whole note when due cannot affect the rights of the holder, unless he will take notice of it and act upon it.

The presumption that two or more promisors of a note are equally responsible for its ultimate payment, so that if one pays the whole he shall have contribution, may be rebutted by showing that one signed for the accommodation and as surety for the other. So in this case, if upon the facts now proved Brooks had paid the note, he would have had a remedy against Damon, not for a contribution only, but for an entire reimbursement. So, if Damon had paid it, he would have had no claim on the defendant for contribution. So,

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where one of two promisors annexes the word "principal" to his signature, and the other "surety," these descriptions do not affect the terms or legal effect of the contract. They are equally bound to the promisee or indorsee as if such words of description had not been annexed. They indicate the relation in which the parties stand to each other, and notice of such relation to the holder.

But the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption. It goes to show that the defendant was in fact a surety, and the rights of contribution result accordingly. Had the parties appeared on the note, the one as principal, and the other as surety, a parol declaration of the holder to the surety that he would exonerate him and look to the principal only is a good defense, on the ground that it lulls the party into security and prevents him from obtaining his indemnity; and it would be fraud on the part of the holder afterwards, contrary to such assurance, to call upon such surety. We think the same result follows where the fact is proved by other evidence. Here the assurance was given, after the note was due, by Barnard, who was the holder of the note, with full power of disposing of it. The present plaintiff, having taken the note by indorsement, long after it was due, took it as a dishonored note, and liable to any defense which could be made to it, had the suit been brought by Barnard.

Judgment on the verdict for the defendant.[6]

SECTION 3.—MISINFORMATION GIVEN TO SURETY BY CREDITOR AS TO STATE OF TRANSACTIONS BETWEEN PRINCIPAL AND CREDITOR (OR PROMISEE)

FRANK FEHR BREWING CO. v. MULLICAN et al.

(Court of Appeals of Kentucky, 1902. 66 S. W. 627, 23 Ky. Law Rep. 2100.)

Appeal from Circuit Court, Daviess County.

HOBSON, J. This was an ordinary action brought by appellant against appellees on a bond signed by them as sureties for L. T. Mul-

[6] Accord: Bank v. Klingensmith, 7 Watts (Pa.) 523 (1838). But where surety has not acted on the promise, he is not discharged. Brubaker v. Okeson, 36 Pa. 519 (1860).

See Hare & Wallace's note to Harris v. Brooks, 21 Pick. (Mass.) 195, 32 Am. Dec. 254 (1838), in 2 American Leading Cases (5th Ed.) pp. 481, 482.

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lican. The case was tried before the court, who filed the following findings of fact:

"The court finds from the record and evidence in this action that on the 12th of July, 1898, the plaintiff entered into a contract with L. T. Mullican to furnish beer at a stipulated price, etc., which he was to sell and account for. He, among other things, was to pay for all beer sold at the prices stipulated thirty days after delivery, and sooner if the relations between them should terminate. The contract contained divers other stipulations, and the defendants, J. S. Mullican and J. A. Lyddane, became the sureties of L. T. Mullican for the faithful performance of his contract. I find from the evidence that L. T. Mullican failed from the very beginning of his contract to pay as stipulated, and proceeded to violate that part of his undertaking to pay for all beer sold him at the end of thirty days, and that on the 17th of November, 1898, four months after entering into the contract, he had fallen behind in the sum of $1,661.36, and that plaintiff, without notification to the sureties of L. T. Mullican, entered into an arrangement with him by which he obtained from him a nearly paid up life policy for $3,000, and entered into a writing, a copy of which is filed with the answer of J. S. Mullican and J. A. Lyddane. I find from the evidence that, as part inducement to this contract of November 17th and the transfer of the policy, plaintiff agreed with L. T. Mullican that his sureties were to be released from further liability. I find that, on the 28th day of December, J. A. Lyddane, becoming uneasy, wrote plaintiff for information as to how L. T. Mullican was getting on with them, and on the next day, the 29th of December, received an answer from plaintiff that he was O. K., making no reference to his previous indebtedness, and disclosing nothing of the transaction of November 17th."

On these facts the court found, as a matter of law, that the sureties were released by the concealment on the part of plaintiff of the default of the principal, although he had arranged and paid out of his own means, on the ground, as stated by the court, that they would not likely "have continued on his bond, or been willing to any further risk after November 17th, had they known of the large sum in which the principal had fallen behind, and a disclosure became a positive duty when Lyddane wrote to inquire."

The letters on which this finding is based are as follows:

"Owensboro, Ky., Dec. 28th, 1898. Frank Fehr Brewing Co., Louisville, Ky.—Gentlemen: I write you confidentially to inquire whether L. T. Mullican is keeping his accounts square with you. I am on his bond to your company, and have a right to ask this information. Please send me a statement of his accounts, so that I may be advised as to his standing with you. This letter is confidential between your company and me, and by furnishing me the information desired you will greatly oblige. Yours truly, J. A. Lyddane."

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"Louisville, Ky., Dec. 29th, 1898. Mr. J. A. Lyddane, Owensboro, Ky.—Dear Sir: Replying to yours of the 28th instant, beg to state that at the present writing Mr. L. T. Mullican owes us only for last shipment, which amounts to $291.50, and shipment gone forward today, amounting to $167.00. The above is statement in full to date, and we feel that everything is O. K. Yours truly, Frank Fehr Brewing Co., by G. W. Kremer, Treas."

Lyddane showed this letter to his co-surety, and they both testify that they were misled by it, and induced to take no steps to protect themselves, supposing that the principal was faithfully performing his contract.

It is insisted for appellant that the letter showed on its face that the principal was in debt to it in the sum of $458.50, and that at the termination of the agency the indebtedness was only $632.34; that the principal had then the same property as in December; and that in fact the prior indebtedness had been settled, and there was no misrepresentation. But the fact is appellant concealed from the sureties the large amount that the principal had fallen behind—a fact sufficient to show that he had violated his contract, and to induce them to take steps to protect themselves. Had they known that the principal had not made his monthly payments, but had used the money, and had covered the deficiency by an assignment of his life policy, it is but reasonable that they would be unwilling to remain longer on his bond, when they were already uneasy from information they had received that his habits were not good. In Story, Eq. Jur. § 324, it is said: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract." These principles were followed by this court in Burks v. Wonterline, 69 Ky. 20; Graves v. Bank, 73 Ky. 23, 19 Am. Rep. 50; Insurance Co. v. Scott, 81 Ky. 540; Bank v. Mattingly, 92 Ky. 650, 18 S. W. 940; Association v. Jeckel, 104 Ky. 159, 46 S. W. 482. Upon the principles settled in these cases, the court properly held the sureties not liable.

Counsel for appellant rely on the following stipulation in the contract: "It is further agreed that the said brewing company is to have the exclusive right at all times during the existence of this contract to determine the amount of credit that shall be extended by it to the said Mullican for beer ordered or purchased by him, and at any time to refuse to sell or deliver to said Mullican, if at said time the said Mullican has failed to pay any bill or account due by him." It is urged that this clause gave the appellant discretion to extend credit for an unlimited time. But we do not so understand it. It relates alone to the amount of credit. It was not intended to modify the

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previous stipulation, requiring payment at the end of every 30 days; and, even if it was susceptible of this meaning, it was the duty of appellant, in answering Lyddane's letter, not to conceal the facts from him, but to apprise him fairly of the situation.

Judgment affirmed.

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CHAPTER X

EFFECT OF ABSENCE OF NOTICE TO SURETY OR GUARANTOR OF THE DEFAULT OF THE PRINCIPAL

ORME v. YOUNG.

(Court of Common Pleas, at Nisi Prius, 1815. 1 Holt, N. P. 84, 3 E. C. L. 35.)

Debt on bond, dated 25th November, 1807, in the penal sum of £44,000., to secure the payment of £22,000., payable by instalments of £1,000. half-yearly, from the 29th of September, 1807, to the 29th of September, 1812, when the residue of the sum secured was to be payable.

The defendant pleaded:

First. Non est factum.

Second. That he entered into the bond as surety for one William Orme, and that the plaintiff, on the 28th of September, 1812, without the privity and consent of the defendant, forbore and gave day of payment of the sum of £13,000., residue of the principal money, then due, to William Orme, Jr., beyond and after the 29th of September, 1812, when the same became payable.

There were other pleas to the same effect.

The case was this: The plaintiff assigned his business to his son, upon his giving him a bond executed by himself and ten sureties, one of which was the defendant, to secure to the father the value of the stock and business. The bond was given for £22,000., payable by instalments of £1,000. half-yearly, until £9,000. should be paid, at which time, the 29th of September, 1812, the residue was to be paid. The son paid the instalments regularly, till the £13,000. became due, at which time he made default in paying the principal sum, but continued to pay his father sums of £1,000. each, at different periods, and in five different payments, down to January, 1815; in all £5,000. In March, 1815, William Orme, Jr., became a bankrupt. No notice had been given to the sureties of the default of William Orme in the payment of £13,000., and it did not appear that they were privy to the mode in which the payments had been made. The plaintiff had indorsed receipts for them upon the back of the bond, giving credit for them as half-yearly receipts, and not making any distinction between the payments before the £13,000. became due, and those made afterwards. They were all entered as half-yearly payments by the son to the father; but no agreement of forbearance was in evidence.[7]

[7] Arguments of counsel are omitted.

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GIBBS, C. J. The defense upon the record is that the plaintiff before the 29th September, 1812, forbore and gave day of payment to William Orme, Jr.; in other words, that the obligee has extended the terms of the obligation without the privity of the sureties. This defense is borrowed from a court of equity. There, if day of payment be given to the debtor, the sureties are discharged. It is the equitable right of sureties to come into a court of equity and demand to sue in the name of the creditor. Now, if the creditor have given time to his debtor, the surety cannot sue him; but the fact to be tried is, was time of payment given without the privity of the sureties? What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining, not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief, because the principal having tied his own hands the surety cannot release them. Here there is no contract to forbear; no impediment to the suit. A neglect to give notice to the surety that the debtor has made default does not discharge him. But the present issue is, was there an agreement to forbear? I am of opinion there was none.

Verdict for plaintiff, for £8,508.[8]

PHILIPS v. ASTLING et al.

(Court of Common Pleas, Michaelmas Term, 1809. 2 Taunt. 206.)

Assumpsit. The declaration stated that in consideration that the plaintiff would sell and deliver to Davenport and Finney certain goods, to the amount of £500., to be paid by a bill for the amount drawn by Davenport and Finney on Houghton at six months, and also in consideration of a certain premium at the rate of £5. per cent. thereon, to be therefore paid by the plaintiff to the defendants, the defendants undertook to guarantee the payment of the sum for which the bill should be so drawn when the same should become due; and the plaintiff averred that he afterwards sold and delivered the goods to Davenport and Finney, to the amount aforesaid, to be paid for as aforesaid, and that such bill of exchange was afterwards, when it became due, duly presented to Houghton for payment; but that he refused to pay, whereof Davenport and Finney and the defendants

[8] Accord: Goring v. Edmonds, 6 Bing. 94 (1829).
Otherwise if notice is stipulated for in the contract. Nat. Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623 (1903).
See the paper entitled "Demand on Principal before Action against Guarantor," 6 Columbia Law Review, 229, by William P. Rogers, Dean of Law Dept. University of Cincinnati.
On notice of default to guarantor, see note, 15 H. L. R. 65.

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respectively had notice, and were requested to guarantee the payment of, and pay the amount of, the bill; but that they did not nor would guarantee or pay the same.

Upon the trial of this cause at the Guildhall sittings after Trinity term, 1809, before Mansfield, C. J., it appeared that, Davenport and Finney being desirous to obtain credit with the plaintiff for provisions for the use of the ship Providence, the defendants gave an undertaking, written with a pencil, in the following terms: "Memorandum.—We jointly and severally undertake to guarantee a payment of £500. at £5. per cent., say, by a bill drawn on G. Houghton by Davenport and Finney for £500. Dated 10th Jan., 1808." The provisions were furnished, and a bill was given in payment for them, dated the 11th of January, and drawn by Davenport and Finney on G. Houghton at six months' date, for £515. 11s. 10d., payable to their own order. It appeared that at the time when the bill became due Houghton was at sea, and remained absent for several months after; but he had a sister residing in London, to whom he had given an authority to fill up and accept bills in his name, and to transact other business for him, and who had in fact accepted this very bill. The bill became due on the 14th of July. It was not presented for payment to the sister. On the 16th notice was given to Davenport and Finney that it remained unpaid, but no notice was given to the defendants. In February, 1809, Davenport and Finney became insolvent; and Houghton was declared a bankrupt in July, 1809. No application was made to the defendants for payment till after the date of both bankruptcies. The jury found a verdict for the plaintiff, deducting the £5. per cent. for the premium of the guaranty, which had never been paid; and the Chief Justice reserved liberty to the defendants to move to enter a non-suit accordingly.[9]

MANSFIELD, C. J. This was an action against two persons on a guaranty, the terms of which are: "Memorandum.—We jointly and separately promise to guarantee a payment of £500. at £5. per cent., say a bill dated 10th January, 1808." Then the bill is given, dated 11th January, and accepted, and, not having been paid, this action is brought. At the trial there appeared reason to believe that Davenport and Finney, the drawers, and Houghton, the acceptor, were all at this time insolvent, but there was no proof of it. Davenport and Finney first became plainly insolvent in February, 1809, a year after this bill was drawn. There was no evidence of any demand being made on Davenport and Finney for the money; and no notice was given them of the bill not being paid till the 16th. Something was said of a threat to arrest them, but there was no evidence of regular notice. As to Houghton, he went abroad; but he left a sister here, of whom a demand might have been made. No demand, however, was made at the place where his sister was to be found.

[9] The arguments of counsel and a portion of the opinion are omitted.

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At the trial it was objected that the plaintiff could not recover, for several different reasons: First, that the defendants stood as indorsers of the bill, and that as indorsers they had a right to insist on proof of the notice of non-payment both by the drawer and acceptor. On the other hand, it was urged, and as we think, justly, that this was a general guaranty for payment of a bill, not, as usual, a guaranty that the acceptor should pay, but a contract that either the one or the other should pay; and the consequence is that, if the guarantee paid the bill, he would have a right to come both on the drawer and acceptor for repayment; and though want of notice would not discharge the acceptor, yet the guarantee, as the holder, had a right to insist on due notice being given to himself of non-payment by the acceptor, and that as to the drawers he had a right to insist on notice being given to them of the same fact, for that otherwise he might pay it in his own wrong if they were discharged. * * *

I strongly think the plaintiff knew the state of all these persons, and that they were not good; but as Davenport and Finney did not become insolvent till long after the bill became due, nor Houghton till long after the bill became due, I do not know how to give the plaintiff the benefit of his contract in this case. I thought it possible that cases might have been found on the interpretation of such a guaranty, in the distribution of bankrupt's effects in the Court of Chancery. None such, however, have been mentioned. In the case of Warrington v. Furbor, 8 East, 245, the expression "say at a credit of six months" seems to be used in a positive sense. That case also arose on a guaranty, and Lord Ellenborough, C. J., expressed the opinion of the court that although the insolvency of the parties to a bill would not in general dispense with the necessity of presenting it for payment, yet where it was obvious that it could not avail, the same strictness of proof was not necessary to charge a guarantee, and therefore if the parties became bankrupts, and notoriously insolvent, it was the same as if they were dead.

Now this case is decided on the ground that the pursuing the course of applying to the acceptor in that case, as here to the acceptors and drawer, would have been of no effect, because there the bankruptcy had already happened before the bill became due. Here the insolvency did not occur till long after the bill became due, and Houghton's bankruptcy was long after that. For anything then that appears, if this gentleman had demanded the money either of the acceptor or drawer, the bill might have been paid. That, too, was a guaranty of payment of the price of goods; this is for a bill, and the contract necessarily implies that the defendants will pay it if the plaintiffs do not, being called on in a proper manner: and therefore, although that case has relaxed the strictness of the proof of presentment and notice, and seems to decide that it is not necessary to pursue the same strictness in order to charge a guarantee as to charge the drawer of the bill, yet it may still be inferred from it that, if the necessary

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steps are not taken to obtain payment from the parties who are liable on the bill and solvent, the guarantee must be discharged; and therefore the rule for a non-suit must be made absolute.[10]

[10] The English cases, including the principal case, holding that notice of default is necessary to one who guarantees the payment of commercial paper, were thus summarized by Chitty in 1839 (Chitty on Bills, p. 474): "In general, if the bill or note be given as a collateral security, and the party delivering it were no party to it, either by indorsing or transferring it by delivery when payable to bearer, but merely caused it to be drawn or indorsed, or delivered over to a third person as a security, or has merely guaranteed the payment, it has been considered that he is not within the custom of merchants an indorser or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from liability by the neglect of the holder to give him such notice, unless he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission; for if a person deliver over a bill to another without indorsing it, he does not subject himself to the obligations of the law merchant, and cannot be sued upon the bill, and as he does not subject himself to the obligation, he is not entitled to the advantages; and if he can prove that he has sustained damage, then he is only discharged to the extent of such actual damage."

Following and in accord with the English case, Philips v. Astling, and consequently holding that a guarantor of commercial paper (though not an indorser) is yet entitled to notice of dishonor, are numerous American cases: Douglass v. Reynolds, 7 Pet. 115, 126, 8 L. Ed. 626 (1833).

Where the surety binds himself as co-obligor with his principal, no notice was necessary to be given of the default to the surety. Nares v. Rowles, 14 East, 510 (1811); Shepherd v. Beecher, 2 P. Wms. 288 (1725); Peel v. Tatlock, 1 B. & P. 419 (1799); Goring v. Edmonds, 6 Bing. 94 (1829); Dawson v. Lawes, 23 Eng. L. & E. 365 (1854); Orme v. Young, 1 Holt, N. P. 84 (1815).

But some American jurisdictions have required notice of non-payment to be given, not merely in cases where commercial paper was guaranteed, but in the case of any contract or debt; but this is in conflict with the doctrine of simple contracts at the common law. See Lawson v. Townes, 2 Ala. 378 (1841).

American Leading Cases (Hare & Wallace, 5th Ed.) note to Douglass v. Reynolds.

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CHAPTER XI

CHANGE IN PERSONALITY OF THE PARTNERSHIP PRINCIPAL

LAMM & CO. v. COLCORD.

(Supreme Court of Oklahoma, 1908. 22 Okl. 493, 98 Pac. 355, 19 L. R. A. [N. S.] 901.)

Error from Probate Court, Oklahoma County.

Action by Lamm & Co. against F. C. Colcord. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error, Lamm & Co., as plaintiff, brought this action in the probate court of Oklahoma county, Okl. T., against the defendant in error, C. F. Colcord, as defendant, to recover the sum of $400 alleged to be due it under the following written guaranty, to wit: "Feb. 27, 1901. Lamm & Co., Chicago, Ill. Dear Sir: You can extend credit to O. C. Scoresby to amount of ($400.00) Four Hundred and I will stand good for same. Yours resp. C. F. Colcord." The case was tried by the lower court without the intervention of a jury on the 24th day of January, 1906.

The evidence on the part of plaintiff showed that between the years 1900 and 1905 it shipped merchandise to the value of thousands of dollars, and charged the same to the Scoresby Tailoring Company, the account beginning with March 1, 1901, and there were various payments made thereon by said Scoresby Tailoring Company, the first account aggregating the sum of $400, having been paid before the beginning of this action. This action is for shipments made during December, 1904, and May, 1905; that is, for a balance thereon, which exceeds the sum of $400. The evidence showed that prior to the time of receiving said guaranty from defendant plaintiff had shipped to said Scoresby only on a C. O. D. basis, having been doing a business with him a year or so before the guaranty was received. The evidence showed that the goods shipped were all charged to the Scoresby Tailoring Company, and there is no proof in the record as to whether or not the Scoresby Tailoring Company and O. C. Scoresby are identical and the same. The account that was made out against the Scoresby Tailoring Company, showing the balance due for goods shipped during December, 1904, and May, 1905, was offered in evidence over the objection of the defendant, on the ground that same was irrelevant, incompetent, and immaterial; it not being shown to be an account for which the guaranty was executed, nor an account relating to or commencing in the year 1901, when the guaranty was given, and it ap-

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peared upon its face that it was an account with the Scoresby Tailoring Company, whereas the guaranty sued on was as to O. C. Scoresby, the presumption being that the Scoresby Tailoring Company was a corporation or a copartnership composed of more than one.

Thereupon the defendant demurred to the evidence on the part of plaintiff upon the ground (1) that same failed to establish facts sufficient to constitute a cause of action in its favor against defendant, or to entitle it to recover from defendant anything whatever; and (2) that the evidence introduced on behalf of plaintiff affirmatively shows, when considered in connection with the pleadings of the parties, that plaintiff is not entitled to recover in this action anything against defendant. The demurrer on the part of defendant was sustained, and judgment rendered by the court for defendant.

Plaintiff in due time presented a motion for a new trial, and the same was overruled. Exceptions being saved, it was allowed 60 days within which to make and serve a case-made, and the defendant was allowed 10 days thereafter within which to suggest amendments thereto, the same to be settled on 5 days' notice, and an appeal bond fixed in the sum of $100. Execution was stayed for 30 days to permit plaintiff to file said bond. The case-made was duly settled, bond executed, and said case taken on petition in error to the Supreme Court of Oklahoma Territory, and in accordance with the provisions of the enabling act was transferred to this court for review.

WILLIAMS, C. J. (after stating the facts as above). In construing the language of an instrument of guaranty for the purpose of interpreting the same to ascertain the intention of the parties it should be taken most strongly against the guarantor, and in favor of the party who has parted with his property upon the faith of the interpretation most favorable to his rights. Scott v. Myatt, 24 Ala. 489, 60 Am. Dec. 485; Lawrence v. McCalmont, 2 How. 426, 450, 11 L. Ed. 326; 20 Cyc. 1425, and authorities cited in footnotes 59 and 60. But when the meaning of the language in a contract of guaranty is ascertained and the actual operation under such construction has begun, the guarantor is entitled to the application of the strict rule of construction, and cannot be held beyond the precise terms of such contract. Brittain Dry Goods Co. v. Yearout, 59 Kan. 684, 54 Pac. 1062; Mayfield v. Wheeler, 37 Tex. 256; Kepley v. Carter, 49 Kan. 72, 30 Pac. 182; First National Bank of Alton, Ill., v. Marbourg, 22 Kan. 535; Woolley v. Van Volkenburgh, 16 Kan. 20; Barnett v. Wing, 62 Hun, 125, 16 N. Y. Supp. 567; Bussier v. Chew, 5 Phila. (Pa.) 70; Eager et al. v. Seeds et al., 21 Okl. 524, 96 Pac. 646; Lemp Brewing Co. v. Secor et al., 21 Okl. 537, 96 Pac. 636.

It is alleged in the petition that "this plaintiff thereupon accepted the above letter of credit or guaranty, and, relying upon the same, agreed to extend and did extend credit to said O. C. Scoresby to the amount of $400; that said O. C. Scoresby bought of this plaintiff, on credit, goods, wares, and merchandise of the value of $400, and for

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which he agreed to pay this plaintiff the sum of $400." In the answer of defendant these allegations are traversed by a general denial. The only proof in the record shows that the goods were furnished and shipped to the Scoresby Tailoring Company, and there is no evidence tending to show whether or not the Scoresby Tailoring Company is a partnership or a corporation, or whether or not the said O. C. Scoresby comprises solely the Scoresby Tailoring Company. The burden was on the plaintiff to make out its case. There is no allegation that O. C. Scoresby and the Scoresby Tailoring Company are one and the same, or that the said O. C. Scoresby solely comprises the Scoresby Tailoring Company, and consequently there was no necessity to affirmatively traverse the same. But there was an allegation that upon said guaranty, and, relying upon the same, plaintiff extended credit to O. C. Scoresby. The only account offered in evidence against any one was that verified by the witness Malone in his deposition, which was against the Scoresby Tailoring Company, and was introduced over the objection and exception of the defendant on the ground that the same was irrelevant, incompetent, and immaterial; it not being shown to be an account for which the guaranty was executed, it appearing on its face that it was against the Scoresby Tailoring Company.

In the case of Cremer v. Higginson et al., 1 Mason, 323, Fed. Cas. No. 3,383, Mr. Circuit Justice Story said: "Having thus fixed the interpretation of the letter on this point, that it is a mere guaranty of the debt of third persons, the next question upon its construction is, To whom are the advances to be made? If there be anything clear in this case, it is that the advances are to be made to Stephen Higginson, Jr., and Henry Higginson, then co-partners in trade under the firm name of S. & H. Higginson. It follows, therefore, that it covers only advances made to them jointly on their joint credit, and not advances made to them severally on their several credit. Unless then it should be completely established that the advances were made on the joint account of the firm, there is an end of the plaintiffs' case."

In the case of Crane Co. v. Specht, 39 Neb. 129, 57 N. W. 1017, 42 Am. St. Rep. 562, Mr. Justice Harrison in delivering the opinion of the court said: "The question raised by the bill of exceptions and strenuously argued by counsel is: Can the Crane Company recover upon the contract of guaranty given by defendants to Crane Bros. Manufacturing Company? The attorneys for plaintiff contending that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company, that it was composed of the same persons, managed by the same officers, engaged in the same business, and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this, as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The

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defendant's attorneys claim that the Crane Company cannot recover by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company any sum due it for goods sold or furnished Lichtenberger after the change of its name to Crane Company. The contention in the case resolves itself to the question, Did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by the defendant in its former name, the price of goods furnished after the change in style to the party whose account was guarantied to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty, and the construction to be given to it. In 1 Brandt on Suretyship and Guaranty (2d Ed.) pp. 134, 135, § 93, it is said, in discussing such contracts: 'A rule never to be lost sight of in determining the liability of a surety or guarantor is that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances.' Again it is said: 'A surety or guarantor usually derives no benefit from his contract. His object, generally, is to befriend the principal. The guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms would be not to enforce the contract made by him, but to make another for him.' "

In the case of Allison v. Rutledge, 5 Yerg. (Tenn.) 193, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of some bacon purchased by one Cooper, under which guaranty he was sued as guarantor by John and Joseph Allison for the price of the bacon. Mr. Chief Justice Catron, in speaking for the Supreme Court of Tennessee, said: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutledge undertook for the debt of Cooper, and is bound by the writing, and this only. The contract cannot be varied, or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper from its face could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant."

In the case of Grant v. Naylor, 4 Cranch, 224, 2 L. Ed. 603, John and Jeremiah Naylor brought an action against Daniel Grant on a letter or contract of guaranty addressed to John and Joseph Naylor. Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "That the letter was really designed for John and Jeremiah

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Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and wise policy, which this court cannot relax, so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. On examining the cases which have been cited at bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co. to either of which this letter might have been delivered. In such a case the letter is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make such a contract is going further than the courts have ever gone, where the writing is itself a contract, and where no pre-existing obligation bound the party to enter into it."

The apparent weight of authority is that no one but the identical person to whom the letter of credit was addressed, or in whose favor the instrument of guaranty runs, or his or their assigns, can maintain an action thereon. Taylor v. McClung, 2 Houst. (Del.) 25; Smith v. Montgomery, 3 Tex. 199; Walsh et al. v. Bailie, 10 Johns. (N. Y.) 180; Penoyer v. Watson, 16 Johns. (N. Y.) 100; Evansville National Bank v. Kaufmann et al., 93 N. Y. 273, 45 Am. Rep. 204; Taylor et al. v. Wetmore, 10 Ohio, 491. The following authorities appear to support the contrary doctrine: Michigan State Bank v. Peck, 28 Vt. 200, 65 Am. Dec. 234; Wadsworth v. Allen, 8 Grat. (Va.) 174, 56 Am. Dec. 137. It is not necessary, however, to determine which announces the correct rule, these authorities being merely referred to for the purpose of illuminating the doctrine of the liability of a guarantor.

In the case at bar the guarantor agreed to answer for the default of O. C. Scoresby. The record shows that upon this instrument of guaranty the goods were furnished the Scoresby Tailoring Company. There is no presumption that they were one and the same. A guarantor has the right to prescribe the exact terms upon which he will enter into the obligation, and to insist upon a discharge in case those terms are not observed. If the Scoresby Tailoring Company was a corporation or a partnership composed of members other than the party mentioned in this guaranty, the defendant could not be held as guarantor in this action. If it were a corporation, its business and assets would be controlled by a board of directors, and the guarantor might have refused to have been bound for its defaults, though the said O. C. Scoresby was one of the stockholders and officers. If it

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were a partnership composed of other members than the said Scoresby, the partnership property and assets would have been subject to the partnership control, and the other partners would have had the same control thereof as the said O. C. Scoresby, and under such circumstances the guarantor might have declined to have become bound. The plaintiff having failed to affirmatively show that the goods were furnished to the party named in the guaranty, the guarantor could not be held on such liability.

There appears to have been no error committed by the lower court in rendering judgment in favor of the defendant. Its judgment is affirmed. All the Justices concur.[1]

[1] Similarly, where the obligees are a partnership and one dies, the surety obligor is not bound as to transactions entered into by the survivors. Weston v. Barton, 4 Taunt. 673 (1812).

St. 19 & 20 Victoria, c. 97, § 4:

"IV. No Promise to answer for the Debt, Default, or Miscarriage of another made to a Firm consisting of Two or More Persons, or to a single Person trading under the Name of a firm, and no Promise to answer for the Debt, Default, or Miscarriage of a Firm consisting of Two or more Persons, or of a single Person trading under the Name of a Firm, shall be binding on the Person making such Promise in respect of anything done or omitted to be done after a Change shall have taken place in any One or more of the Persons constituting the Firm, or in the Person trading under the Name of a Firm, unless the Intention of the Parties, that such Promise shall continue to be binding notwithstanding such Change, shall appear either by express Stipulation or by necessary Implication from the Nature of the Firm or otherwise."

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CHAPTER XII

THE STATUTE OF LIMITATIONS

McGOVERN v. RECTANUS et al.

(Court of Appeals of Kentucky, 1907. 105 S. W. 965, 32 Ky. Law Rep. 364, 14 L. R. A. [N. S.] 380.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by John McGovern against Theodore Rectanus and others. From a judgment for defendants, plaintiff appeals. Affirmed.

CLAY, C.[1] This is an appeal from a judgment of the Jefferson circuit court, common pleas branch, second division, dismissing appellant's petition, wherein he sought to recover of appellees, sureties upon a policeman's bond, the sum of $500, with interest and costs, for which amount appellant had in another action recovered judgment against the policeman himself. The petition alleges that on June 12, 1899, Edward Powell, a police officer of the city of Louisville, illegally arrested and assaulted appellant; that on August 14, 1899, he sued Powell for damages, and recovered judgment on June 22, 1904, for $500, with interest from the date of the judgment and costs; and that Powell appealed from this judgment, and it was afterwards affirmed by the Court of Appeals. Appellant also alleges that appellees are the sureties on Powell's bond as such police officer.

This action was instituted on October 6, 1906, more than seven years after the alleged assault. The petition charges that this judgment was for actual damages only; but the answer pleads that, under the instructions given by the court on the trial of that action, the judgment obtained includes punitive damages, and that appellees, as sureties, are not liable for punitive damages. The answer further pleads that appellant's cause of action is barred by the seven-year statute of limitation applicable to sureties. Appellant, by way of reply, pleads that he was obstructed in prosecuting his action against the sureties by delays in his litigation with the principal and by the appeal prosecuted by the principal in the original action, to which the sureties were not parties. The court below sustained a demurrer to the reply, and dismissed the petition.

The two questions presented to this court are: First, is appellant's cause of action barred by the seven-year statute of limitations? Sec-

[1] The opinion has been abridged, by omitting all the discussions of the questions whether the plaintiff was "obstructed in prosecuting" the action, within the meaning of the Kentucky statute, and whether the principal and surety can in that jurisdiction be joined in the same action.

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ond, was he obstructed in prosecuting the present action within the meaning of the statute on the subject?

Section 2551 of the Kentucky Statutes of 1903 provides that the surety on any obligation, other than those provided for under sections 2945 and 2950, shall be discharged from liability when seven years shall elapse without suit thereon after the cause of action accrued.[2] The bond in this case was executed on the 13th of August, 1898, and the assault complained of took place on June 12, 1899, more than seven years before October 6, 1906, the date of the institution of this action. The real question, then, is whether or not appellant's cause of action accrued against appellees on June 12, 1899, when the alleged assault was committed. In Schwearman v. Commonwealth, 99 Ky. 296, 38 S. W. 146, and Grant County v. Lemmon, 78 S. W. 874, 25 Ky. Law Rep. 1725, this court recognized the rule that the cause of action against the surety of a county clerk and treasurer of a building and loan association for a defalcation by the officer accrued when the defalcation was committed, expressly holding that, as the surety may be sued jointly with the principal, the cause of action accrues against him at the same time that it accrues against the principal. * * *

It is true that in Craddock v. Payton [114 Ky. 298, 70 S. W. 684], this court held that the surety of a personal representative could not be sued until there had been a judgment against the administrator fixing his liability. This rule, however, has been confined to sureties upon the bonds of personal representatives, as will be seen by reference to authorities referred to in that case. Being of the opinion, therefore, that the party for whose benefit the bond is given may, when the conditions of the bond are violated, sue both the principal and the sureties, it will necessarily follow that the cause of action against the sureties accrues at the same time as it does against the principal.

As appellant did not sue appellees until seven years had elapsed from the time that his cause of action accrued, his cause of action was barred by the statute of limitations, unless appellant's reply exhibited such a state of facts as would, under section 2552, suspend the running of the statute. * * *

Judgment affirmed.[3]

[2] The liability of the surety by simple contract at common law was limited to six years by the statute of limitations. St. 21 Jac. I, c. 16.

This statute applies to a surety who by simple contract guarantees a mortgage. Henton v. Paddison, 9 Times Law Reports, 333 (1893).

[3] Accord: Parr's Banking Co. v. Yates, 67 L. J. Q. B. 851 (1898).

The statute of limitations having run in favor of the surety, he is in some states not bound by a new promise to pay, unless there is a new consideration. This may consist of further forbearance to the principal. Steger v. Jackson, 102 S. W. 329, 31 Ky. Law Rep. 434 (1907).

Other jurisdictions, following the analogy of the liability of the principal under like circumstances, require no new consideration to sustain a subsequent promise after the statute has run. Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495 (1897); Collins v. Bane, 34 Iowa, 385 (1872).

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NELSON v. FIRST NAT. BANK OF KILLINGLEY.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1895. 69 Fed. 798, 16 C. C. A. 425.)

In error to the Circuit Court of the United States for the District of Minnesota.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.[4] * * *

It is contended that the plaintiff in error was relieved from all liability on the note in suit, and that the court should have so charged the jury, because he stood in the relation of a surety for the maker of the note, and the defendant in error had permitted its claim against the principal to become barred by the statute of limitations before the trial of this action. The facts on which this claim is based are that the bank filed a claim against the maker of the note and the plaintiff in error in this action several years before the statute of limitations ran against either of them, and caused the summons in the action to be served upon the plaintiff in error, but did not cause it to be served upon the maker of the note at all, and its claim against him became barred by the statute before the trial of the action. There was, however, no evidence of any agreement on the part of the bank to extend the time of payment to the maker, or to forbear or delay the prosecution of its action against him. The statutes of the state of Minnesota provided that an action might be brought against two or more persons for the purpose of compelling one of them to satisfy a debt due to the other for which the plaintiff was a surety. Gen. St. Minn. 1878, c. 66, § 130 (Gen. St. 1894, § 5272). The plaintiff in error could have paid the note at any time before the statute ran in favor of the maker, and could then have enforced repayment by the maker, or he could have maintained an action against the maker under the statute we have cited, without first paying the note. Under this state of facts, the plaintiff in error was not released from his liability on the note by the mere failure of the bank to press its action against the maker.

Conceding that the plaintiff in error was an accommodation indorser of the note, and that his relation to the maker after he was charged as an indorser was that of a surety, still this relation imposed no obligation of active diligence upon the bank in the prosecution of its suit against the principal. The surety assumes for himself the liability of his principal. The contract of suretyship is not that the creditor will see that the principal pays the debt or performs the obligation, but that the surety will see that the principal pays or performs. It is true that, if the creditor makes a binding agreement with the principal that he will extend the time of payment or forbear to col-

[4] The facts sufficiently appear in the opinion, of which only so much is printed as relates to the statute of limitations.

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lect the debt, this will release the surety. But the reason of this rule is that such an agreement ties the hands of both creditor and surety, and deprives the surety of his right to pay the debt at any time and enforce repayment from the principal. Mere forbearance or delay in enforcing the obligation of the principal has no such effect, and hence does not release the surety. 2 Brandt, Sur. § 342; Reid v. Flippen, 47 Ga. 273, 276, 277; Whiting v. Clark, 17 Cal. 407, 411; Hunt v. Bridgham, 2 Pick. (Mass.) 581, 584, 13 Am. Dec. 458; Mueller v. Dobschuetz, 89 Ill. 176, 182; Hubbell v. Carpenter, 5 N. Y. 171, 177, 178; Rucker v. Robinson, 38 Mo. 154, 90 Am. Dec. 412; Morse v. Huntington, 40 Vt. 488.

There are 43 alleged errors assigned in this record. We have carefully considered each one of them. We have reviewed the most important of them—those upon which counsel for plaintiff in error appeared to place chief reliance—and we have stated the reasons why they cannot be sustained. No good purpose would be served by an extended discussion of the alleged errors we have not noticed. It is sufficient to say that no exception was taken to the charge of the court, the evidence was sufficient to warrant the verdict, and the court below, in our opinion, committed no material error in the trial of this case.

The judgment below must be affirmed, with costs; and it is so ordered.[5]

HOOKS & WRIGHT v. BRANCH BANK AT MOBILE.

(Supreme Court of Alabama, 1845. 8 Ala. 580.)

Error to the Circuit Court of Mobile.

Motion by the bank against the plaintiffs in error.

Plea, that the defendants were the sureties of one C. Hooks, who has departed this life; that administration has been granted on his estate, but that the administrator was not notified of the existence of the debt, by which the estate has been discharged from its payment.

To this plea the bank demurred and the court sustained the demurrer, and rendered judgment for the bank, from which this writ is prosecuted.

[5] In accord with the main proposition that the surety is not discharged because the principal's estate is discharged by the statute of limitations: Banks v. State, Use of Ranstead, 62 Md. 88 (1884); Moore et al. v. Gray, 26 Ohio St. 525 (1875), which puts the rule upon the principle that the surety is by the common law a joint debtor; Willis & Bro. v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842 (1897); McBroom v. Governor, etc., 6 Port. (Ala.) 32 (1837); Bell v. Walker, 54 Neb. 222, 74 N. W. 617 (1898); Daniel v. Vinson, 10 Tex. Civ. App. 439, 31 S. W. 421 (1895).

Contra: Auchampaugh v. Schmidt, 70 Iowa, 642, 27 N. W. 805, 59 Am. Rep. 459 (1886), dissentiente, Reed, J.

On surety's defense that the debt against the principal is barred by limitation, see note in 15 H. L. R. 497.

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ORMOND, J. The exemption from suit, if due presentment of the debt is not made to the representative of an estate, is a privilege appertaining to the estate of the deceased and those interested in it, and cannot be claimed by any other person liable on the same debt. Nor is the right of one so circumstanced, who may be compelled to pay the debt, to proceed against the estate, at all affected by the omission of the creditor to present the claim to the representative of the estate. His right to recover from his principal arises from the payment of the debt, and is not impaired by the omission of the creditor to make due presentment. This point was expressly ruled in the case of Cawthorne v. Weisinger, 6 Ala. 716, and previously in McBroom v. Governor, 6 Port. 32.

Let the judgment be affirmed.

WHITING et al. v. CLARK.

(Supreme Court of California, 1861. 17 Cal. 407.)

Appeal from the Fourth District.

Suit commenced by Whiting, Goodman & Co., August 26, 1859, on the following written guaranty:

"San Francisco, Dec. 19, 1859.

"For a valuable consideration, I hereby guaranty the payment for any goods which Whiting, Goodman & Co. shall deliver to George S. Porter, or his order, on and after this date.

"[Signed] G. W. Clark."

The complaint avers that plaintiffs gave defendant notice that they accepted the guaranty, and afterwards, relying on it, between its date and June 1, 1858, sold and delivered to Porter goods amounting to $795.50, and notified defendant thereof at the time of the sales, and that on the 17th September, 1858, there was a balance due of $395.50, for payment of which demand was then made of Porter and refused; that defendant was on the same day notified of such refusal, and demand made on him for payment; and that August 1, 1859, plaintiffs presented defendant an account of said balance, and demanded payment, etc. Prayer for $500 damages and costs.

The answer admits knowledge of the sales up to April 20, 1858, but denies that defendant was ever notified of any sales after that date, or that he was notified of any demand on Porter or of the time when his account was due, until August, 1859. It also sets up that the goods sold to Porter were charged to him in a book account, and that he (Porter) is indebted on this book account only, that plaintiffs have failed to sue him for the amount, and that the cause of action against Porter has accrued more than one year before the commencement of this suit, and is barred.

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The case was tried before the court, and the allegations of the complaint were substantially found true. The account on plaintiffs' books was against Porter. Judgment for plaintiffs for $395.50, with 10 per cent. interest from September 1, 1858, in all $452.29.

Defendant moved for a new trial, on the ground that the finding is not justified by the evidence and is against law. Overruled. Defendant appeals.[6]

BALDWIN, J., delivered the opinion of the court; FIELD, C. J., concurring.

This suit is brought on a guaranty by defendant of a debt of or for one Porter. The only thing set up in defense which it is necessary to notice is the plea that no suit has been brought to charge the original debtor, and that the statute of limitations bars the claim as to him. But this is no defense. After legally charging the defendant, the plaintiff was not bound to sue the principal, at least, unless requested by the guarantor; and the surety had in his own hands the means of protecting himself from loss by delay, by paying the debt and then suing the principal, or by filing a bill to compel the creditor to sue. By the guaranty the defendant became the debtor of the creditor, and no other limitation could defeat the claim than that prescribed by law for the class of indebtedness evidenced by the paper.

Probably the charge of $56 for interest is erroneous; but this matter should have been brought distinctly to the notice of the referee, and objection taken to the judgment and finding on this account.

Judgment affirmed.[7]

WHITCOMB v. WHITING.

(Court of King's Bench, 1781. 2 Doug. 651a.)

Declaration, in the common form, on a promissory note executed by the defendant. Pleas, the general issue, and non assumpsit infra sex annos. Replication, assumpsit infra sex annos. The cause was tried before Hotham, Baron, at the last assizes for Hampshire. The plaintiff produced a joint and several note, executed by the defendant and three others; and, having proved payment by one of the others of interest on the note, and part of the principal, within six years, and the judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On Friday, the 4th of May, a rule was granted to show cause why there should not be a new trial, on the motion of Lawrence, who cited Bland v. Haslerig, C. B. H. 1 & 2 W. & M. 2 Ventr. 151, and this day, in support of the application, he contended that the plaintiff, by suing

[6] The arguments of counsel are omitted.

[7] Accord, the following case of suretyship: Villars v. Palmer, 67 Ill. 204 (1873).

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the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and therefore, whatever might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of Heylin v. Hastings, B. R. H. 10 Will. III, reported in 1 Salk. 29, and 12 Modern, 223, and Hemings v. Robinson, C. B. M. 6 Geo. II, Barnes Qto. Ed. 436. It was decided that the confession of nobody but a defendant himself is evidence against him. That last case was an action by an indorsee of a note against the drawer, and the plaintiff proved the acknowledgment of a mesne indorser that the indorsement on the back of the note was in his handwriting; but the court was of opinion that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord MANSFIELD. The question, here, is only whether the action is barred by the statute of limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due.

WILLES, Justice. The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

ASHHURST and BULLER, Justices, of the same opinion.

The rule discharged.[8]

[8] After the death of one of the joint promisors, the contract becomes several at common law, and a payment by the survivor would not postpone the statute as against the executor of the decedent. Atkins v. Tredgold, 2 Barn. & C. 23 (1823).

Where the promise was joint, at common law, the doctrine of the principal case admittedly applied. In re Wolmershausen, 62 Law Times (N. S.) 541 (1890).

But where the promise was merely several the doctrine of the principal case is inapplicable. "In no case, so far as I have been able to discover, has it been held that, where the liability arises from several promises, a payment by one of the parties so severally liable prevents the statute from running in favor of the others." Sterling, J., In re Wolmershausen, 62 Law Times (N. S.) 541 (1890).

The Mercantile Law Amendment Act of 1856 (19 & 20 Vict. c. 97, § 14) enacts that:

"In reference to the provisions of the Acts 21 Jac. I, c. 16, sect. 3, the 3 & 4 Will. IV, c. 42, sect. 3, and the 16 & 17 Vict. c. 113, sect. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them so as to be chargeable in respect or by reason only of payment of any principal, interest, or other

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CROSS v. ALLEN.

(Supreme Court of the United States, 1891. 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843.)

Appeal from the Circuit Court of the United States for the District of Oregon.

The case is stated in the opinion.

Mr. Justice LAMAR delivered the opinion of the court.[9]

This was a suit in equity to foreclose two mortgages of real estate in Oregon. The case is this: On the 1st of November, 1871, Thomas Cross, of Salem, Oregon, gave his note to the firm of Allen & Lewis, of Portland, in that state, for $30,000, payable in three years, with interest at 10 per cent. per annum from date; and to secure its payment he and his wife, Pluma F. Cross, on the same day executed a mortgage in favor of that firm upon fifteen parcels of agricultural land in that state, numbered respectively from 1 to 15, and containing over 3,000 acres. Parcels 14 and 15, containing about 211 acres, were the separate property of Pluma F. Cross, while the remainder of the property belonged to Thomas Cross. On January 23, 1872, they gave another mortgage to the same firm upon the same property embraced in the preceding mortgage and certain town lots in Salem, to secure the payment of another note, of even date therewith, given by said Thomas Cross to said firm, for $10,000, due in one year, and bearing 12 per cent. interest from date.

On the 16th of September, 1872, before either note became due, Pluma F. Cross died; but there was never any administration of her estate. Nothing was paid on either of the notes when they became due. * * *

money by any other or others of such co-contractors, co-debtors, executors, or administrators."

Lord Chief Justice Best, in Perham v. Raynall, 9 Moore, C. P. 566 (1824), says: "It therefore seems that the principle laid down in Whitcomb v. Whiting applies to all instances of admissions made by one of several persons jointly concerned or who has a joint interest; and we should create an anomaly in the law by departing from it."

Contra: Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47 (1881), payment after maturity.

So far as the principal case would apply to a payment by one partner after dissolution, so as to postpone the statute of limitations as to his co-partner, the case is not accepted generally in the United States. Bell v. Morrison, 1 Pet. 351, 7 L. Ed. 174 (1828); Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650 (1828); Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47 (1881). See, also, Story on Partnership, 462, note.

But in some jurisdictions it is recognized and applied. Day v. Merritt, 38 N. J. Law, 32, 20 Am. Rep. 362 (1875); Casebolt v. Ackerman, 46 N. J. Law, 172 (1884); Pope v. Risley, 23 Mo. 185 (1856).

Whitcomb v. Whiting has been thoroughly annotated by Hare & Wallace in 1 Smith's Leading Cases, pt. 2, p. 983.

[9] Only so much of the opinion is given as relates to the question of the statute of limitations.

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This leads up to the next question of the case, viz., laches, staleness of claim, and the statute of limitations of the state of Oregon.

Pluma F. Cross, having executed a mortgage upon her separate property to secure the debt of her husband, became as to that debt a surety. She did not become personally bound for the payment of the debt, but her property mortgaged was bound. As such surety, she was entitled to all the rights and privileges of a personal surety, and would be discharged from anything that would discharge a surety who was personally bound. Spear v. Ward, 20 Cal. 659, 674; Gahn v. Niemcewicz, 11 Wend. (N. Y.) 312, 326; Vartie v. Underwood, 18 Barb. (N. Y.) 561, 563; Bank of Albion v. Burns, 46 N. Y. 170, 175; Bishop, Law of Married Women, § 604; Brandt on Suretyship and Guaranty, § 22; Jones on Mortgages, § 114. And the appellants, having succeeded by inheritance to the estate and interest of their mother, occupy the same position as she would have done had she lived. Bank of Albion v. Burns, supra. Her death did not discharge her estate from the lien which she created upon it, nor did it vest in her heirs an estate which she had conveyed away as a security for her husband's debts. Miner v. Graham, 24 Pa. 491, 495.

It is by the application of these rules to the facts of this case that the liability of the surety is to be determined. Under the Civil Code of Oregon, the period of limitation for promissory notes is six years; and it is argued that, as the notes in this controversy were not sued on until more than six years from the dates when they respectively became due, an action on them would not lie, notwithstanding the fact that the maker made payments of interest upon them from time to time. The facts in this matter are these: The first note was dated November 1, 1871, payable in three years. Consequently it matured November 4, 1874, and, if no payment of interest had been made, the bar of the statute would have been complete November 4, 1880; but in 1877, 1878, 1880, and on the 22d of December, 1881, partial payments of interest were made on the note by Thomas Cross, or in his interest. The second note was dated January 23, 1872, payable in one year, and consequently matured January 26, 1873. The bar of the statute on this note would have been complete January 26, 1879, had no interest been paid upon it in the meantime. It is averred in the bill and admitted in the answer that the interest on this note was paid in full up to January 25, 1879, one day before the completion of the bar; and another payment of interest was made February 1, 1883. This suit was commenced August 6, 1884. Consequently it is to be observed that there never was a period of six years between the making of either note and the bringing of this suit that no payments were made upon them.

Section 25 of the Code of Civil Procedure of Oregon provides as follows: "Whenever any payment of principal or interest is made on an existing contract, whether it be bill of exchange, promis-

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sory note, bond or other evidence of indebtedness, after the same becomes due, the limitation shall commence from the time the last payment was made."

It is conceded that the payments of interest above referred to serve to keep the debt alive, so far as the principal was concerned; but it is argued that they did not do so with reference to the surety, Pluma F. Cross, or her estate, especially in view of the fact that she died before the maturity of either note, and also in view of the fact that she never signed the notes at all, but became a legal surety by reason of having signed the mortgages.

This presents a question worthy of much consideration. At common law, a payment made upon a note by the principal debtor before the completion of the bar of the statute served to keep the debt alive, both as to himself and the surety. Whitcomb v. Whiting, 2 Doug. 652; Burleigh v. Stott, 8 B. & C. 36; Wyatt v. Hodson, 8 Bing. 309; Mainzinger v. Mohr, 41 Mich. 685, 3 N. W. 183.

That is the rule in many of the states of this Union—in all, in fact, where it has not been changed by statute. National Bank of Delavan v. Cotton, 53 Wis. 31, 9 N. W. 926; Quimby v. Putnam, 28 Me. 419. At common law, and in those of the states where the common-law rule prevails, a distinction is made between those cases in which a part payment is made by one of several promisors of a note before the statute of limitations has attached and those in which the payment is made after the completion of the bar of the statute; it being held in the former that the debt or demand is kept alive as to all, and in the latter that it is revived only as to the party making the payment. Atkins v. Tredgold, 2 B. & C. 23; Sigourney v. Drury, 14 Pick. (Mass.) 387, 391; Ellicott v. Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546, and cases cited. The reason of this distinction lies in the principle that, by withdrawing from a joint debtor the protection of the statute, he is subjected to a new liability not created by the original contract of indebtedness.

There is no statute of Oregon, so far as we have been able to discover, changing the common-law rule of liability with reference to sureties. Consequently, under the admitted facts of this case, it must be held that the statute of limitations of the state never operated as a bar to the enforcement of the original demands against both the principal and the surety.

Nor do we think the death of the surety before either of the demands matured makes any difference, in principle, where, as in this case, the liability is not of a personal nature, but is an incumbrance upon the surety's property. We are aware that there is authority holding that payment of interest by the principal debtor, after the death of the surety, but before the statute of limitations has run against the note, will not prevent the surety's executors from pleading the statute. Lane v. Doty, 4 Barb. (N. Y.) 530; Smith v. Townsend,

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9 Rich. Law (S. C.) 44; Byles on Bills, § 353; 2 Parsons on Notes and Bills, 659, and note "t." But we know of no authority extending this rule to the representatives of a deceased surety, whose liability was not personal, but upon property mortgaged. On the contrary, the cases of Miner v. Graham and Bank of Albion v. Burns, supra, seem to recognize the doctrine which we are inclined to accept. We conclude, therefore, that the contract of suretyship in this case was not terminated by the death of the surety before the maturity of the indebtedness. * * *

Upon the whole case we are of the opinion that the decree of the court below was correct, and it is affirmed.

The CHIEF JUSTICE and Mr. Justice GRAY did not hear the argument or take part in the decision of this case.

LOUISA DEATON et al. v. JOSEPH DEATON et al.

(Appellate Court of Illinois, 1902. 109 Ill. App. 7.)

Appeal from the Circuit Court of Morgan County.

On March 1, 1887, Thomas Deaton borrowed from N. Adelia Blakeman $350, and delivered to her his promissory note for that sum and interest, payable two years after date, with Robert Deaton as surety. He and his wife, Matilda Deaton, on the same day, to further secure the payment of the note, executed and delivered to Blakeman a mortgage on the northwest quarter of the southeast quarter of section 11, township 15 north, range 11 west, in Morgan county, Illinois. The west half of the tract was then owned by Matilda Deaton and the east half by Thomas Deaton.

On February 21, 1888, Matilda Deaton died intestate, leaving her husband, Thomas Deaton, and as her only heirs at law seven children, to wit, Louisa, Permelia, Joseph, Nathan, Augustus and John Deaton, and Sardelia Waunamaker. On February 6, 1890, Thomas Deaton conveyed to Louisa Deaton and Permelia Deaton the east half of the above-described land, and on June 19, 1890, Sardelia Waunamaker conveyed to her father, Thomas Deaton, and her brothers and sisters above named, all her title and interest in the west half of the tract.

On February 7, 1891, Thomas Deaton paid $100 on the principal of the above-mentioned note and the interest to that date, and on February 14, 1891, N. Adelia Blakeman, the payee, assigned the note to Louisa Deaton and Permelia Deaton, and also delivered to them a formal assignment of the mortgage given to secure it.

On February 28, 1900, Thomas Deaton died intestate, leaving as his only heirs at law the seven children above named. Sardelia Waunamaker, on January 19, 1901, conveyed her interest, inherited from her father, to Louisa and Permelia Deaton.

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On February 5, 1901, Louisa and Permelia Deaton filed in the circuit court of Morgan county their bill in equity against their brothers, Joseph, John, Augustus and Robert Deaton, praying for an accounting of the amount due on the said note and mortgage, and that they be required to pay their equitable and pro rata share of the amount so found to be due, and in default thereof their interests in the west half of the said tract of land be sold. Only John Deaton and Joseph Deaton answered. The other defendants were defaulted. The answer set up that the note and mortgage were barred by the statute of limitations, and upon that issue the cause was referred to the master in chancery for proofs and findings. Before the hearing John Deaton died, and his widow, Georgia Deaton, and four children, were substituted as defendants. The master heard the proofs and reported that there was due on the note and mortgage the sum of $479.55, and that the complainants had no right to foreclose the mortgage except as to the undivided one forty-ninth part, which was owned by Thomas Deaton at the time of his death. The court sustained the master's report and rendered a decree accordingly, to which the complainants excepted, and now, by appeal, bring the record to this court for review.

Mr. Justice HARKER delivered the opinion of the court.

The sole question for our decision is whether the circuit court erred in holding that the note and mortgage in question were barred by the statute of limitations as against the remaining interests of appellees in the land which Matilda Deaton owned at the time of her death.

The note became due on the 1st of March, 1889, and under section 16 of the limitations act was barred ten years thereafter, unless the bar was removed by payment, or new promise to pay, in writing. Appellants' bill was not filed until February 5, 1901, nearly two years after the expiration of the ten years. It is contended that because of the payment made by Thomas Deaton on the 7th of February, 1891, the statute did not begin to run until that date. That is true as to Thomas Deaton, the principal maker, and as to the land owned by him that was included in the mortgage, but not as to the land owned by his wife, Matilda Deaton. When she pledged her land to the payment of the debt, the pledge was that of a surety. The law is well settled in this state that a payment or new promise of the principal maker of a promissory note, which has the effect to take the case out of the statute of limitations so far as he is concerned, does not remove the bar so far as it relates to his unadvised and non-consenting surety. Kallenback v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Ætna Life Ins. Co. v. McNeely, 65 Ill. App. 222; Ætna Life Ins. Co. v. McNeely, 166 Ill. 540, 46 N. E. 1130.

A surety who executes a mortgage to secure a note and does not sign the note is entitled to all the rights and privileges of a personal

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surety under the statute, and whatever would be necessary to remove the bar in the one case would be required in the other.

The decree of the circuit court will be affirmed.[10]

MASON v. KILCOURSE.

(Supreme Court of New Jersey, 1904. 71 N. J. Law, 472, 59 Atl. 21.)

On appeal from District Court.

The opinion of the court was delivered by

FORT, J. This was an action against an indorser of a promissory note. The note was dated October 1, 1896, payable four months after its date, and was for $150. When the note came due it was protested for non-payment. On the 10th of August, 1901, the maker paid $75 upon the note. This case is brought to recover the balance. There was no controversy about the signatures.

The judgment in the district court was for the defendant, and it is contended in this court that the judgment should be sustained, for several reasons. There was no proper proof of protest and notice thereof to the defendant. The certificate of the notary was offered in evidence in the cause and admitted. This is permissible only when a copy of the notarial certificate is annexed to the state of the demand filed in the cause. P. L. 1900, p. 367, § 21. No copy of such certificate was annexed to the demand in this case.

The defendant in this cause filed a plea in the district court, and stated that his defense would be the statute of limitations, and that the note set forth in the plaintiff's declaration had not been legally protested. The notarial certificate, which was admitted in evidence in this cause, and which is returned in the record, even if it had been evidential, does not establish the requisites of a good protest. It does not show in what post office the notice to the defendant was deposited, nor does it show to what post office address the letter said to contain the notice was directed to the defendant. The defendant, therefore, was entitled to have the offer in evidence of the notarial certificate overruled, and, for failure of proof to protest which would have resulted from the overruling of this offer, he would have been entitled to a non-suit. But upon the certificate itself, it not showing proper notice, even if it had been properly admitted in evidence, he was likewise entitled to his motion for a non-suit.

But as the case has been tried, and is here upon its merits, we think the judgment upon the merits was also right. The contract of indorsement is an independent contract, contingent in character, to be-

[10] In the principal case payment was made before statute had run.
Accord: Monroe v. Herrington, 110 Mo. App. 509, 85 S. W. 1002 (1905).
Contra: By statute, Garrett v. Reeves, 125 N. C. 529, 34 S. E. 636 (1899).

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come absolute upon the failure of the maker to pay the note at maturity, and upon proper protest and notice thereof to the indorser. The contract of the maker and the indorser, after such non-payment and protest, is several, not joint. A payment on account by the maker will not take the case out of the statute of limitations against the indorser.

In Parker v. Butterworth, 46 N. J. Law, 244, 50 Am. Rep. 407, it was held that a payment by one joint promisor will not remove the bar of the statute of limitations as against a co-promisor, in whose favor the statute has attached at the time of the payment.

Whitcomb v. Whiting, 2 Doug. 652, was followed in this court in Parker v. Butterworth, and the extent of the holding in that case was that a payment by a joint and several promisor, made before the note is outlawed, is a good payment as against all and revives the note for six years from such payment; but a payment by such a joint promisor after the statute has attached will not revive the note as against other joint and several promisors.

In Casebolt v. Ackerman, 46 N. J. Law, 169, it was held that one partner, paying upon a partnership debt which had become outlawed, could revive the obligation against the partnership. This case followed the decision of this court in Day v. Merritt, 38 N. J. Law, 32, 20 Am. Rep. 362.

The principle of this case is, however, not within any of these cases. A payment by one of several promisors will not revive an obligation as against the bar of the statute of limitations as to any other party to the instrument except the promisor so paying. But an indorser is neither a joint nor a several promisor. His obligation arises out of the contract of indorsement, after default and notice, and is independent of the maker's liability, or the liability of any other indorser upon the note, and but for our statute, which authorizes an action against the maker and an indorser, or indorsers, in one suit, a suit against an indorser would have to be brought separate and apart from the maker.

The statute of limitations was a complete bar to the suit against this defendant in this case, and the judgment of the district court is affirmed, with costs.

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CHAPTER XIII

DISCHARGE IN BANKRUPTCY

CILLEY v. COLBY.

(Supreme Court of New Hampshire, 1881. 61 N. H. 63.)

Assumpsit, on a note dated July 14, 1876, signed by the defendant as surety. The principal filed his petition in bankruptcy February 6, 1877. The plaintiff proved his claim, and voted for assignee. Subsequently the bankrupt submitted to his creditors a proposition for a composition of 10 per cent. in satisfaction of their claims, under section 17 of the amendment to the bankrupt act approved June 22, 1874 (Act June 22, 1874, c. 390, 18 Stat. 182). The creditors passed a resolution accepting the proposition, the plaintiff voting to ratify and confirm it. His signature was necessary to make the required amount and confirm the resolution. The composition was accepted, and ordered to be recorded. The 10 per cent. was paid, and the creditors, including the plaintiff, signed a receipt in full payment and liquidation of their respective claims in composition in bankruptcy, November, 1877.

STANLEY, J. The defendant is liable, unless the plaintiff's vote in favor of a resolution accepting the proposition of 10 per cent., to be paid to the creditors in discharge of their claims against the principal, has the effect to release him. In a composition, no actual discharge of the principal is given; but the payment of the amount offered, and its acceptance by the creditor, is in effect a discharge, for by it all right of action against the bankrupt is barred. "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Rev. St. U. S. § 5118.

The voluntary discharge of the principal by the creditor discharges the surety; but proceedings in bankruptcy, even though the creditor participates therein, do not have the effect of a voluntary discharge. It is not the act of the creditor alone that makes the composition valid. A majority in number and amount must concur in consenting, and the court must also give its consent. If the plaintiff's consent was necessary, and if his withholding it would have prevented the bankrupt from obtaining his discharge, it does not follow that his signature alone was effectual. It was the concurrent act of a majority in number of the creditors and in amount of their debts, with the assent of the court, that made the composition effectual. Unless these three

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conditions had co-existed, there would have been no valid composition. Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; Farwell v. Raddin, 129 Mass. 7; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926.

The same construction is given by the English courts to their statute of compositions, from which our own was, no doubt, copied. Browne v. Carr, 7 Bing. 508; Ellis v. Wilmot, L. R. 10 Ex. 10; Simpson v. Henning, L. R. 10 Q. B. 406; Ex parte Jacobs, L. R. 10 Ch. 211.

Judgment for the plaintiff.

ALLEN, J., did not sit. The others concurred.[1]

[1] Accord: Ray v. Brenner, 12 Kan. 105 (1873); Ames v. Wilkinson, 47 Minn. 148, 49 N. W. 696 (1891); Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986 (1904); Pinkard v. Willis, 24 Tex. Civ. App. 69, 57 S. W. 891 (1900); Cochrane v. Cushing, Ex'x, 124 Mass. 219 (1878).

Where the creditor's claim depends upon a contingency which has not yet happened at the time of the principal's discharge, and hence is not provable under the commission, a fortiori the discharge of the principal in bankruptcy will not bar a subsequent action by the creditor against the surety upon happening of the contingency. Leader v. Mattingly, 140 Ala. 444, 37 South. 270 (1904); Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654 (1905).

See note on "Proof of Contingent Claims in Bankruptcy" in 14 H. L. R 372.

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CHAPTER XIV

EFFECT OF JUDGMENTS PLEADED IN BAR

CRUM v. WILSON, Adm'r, et al.

(Supreme Court of Mississippi, 1883. 61 Miss. 233.)

Appeal from the Circuit Court of Pontotoc County; Hon. W. S. Featherston, Judge.

On February 15, 1859, Benjamin C. Earle, of whose estate the appellee, Jefferson Wilson, is administrator, was by the probate court of Pontotoc county appointed guardian of the appellant, whose father was then living. Earle gave bond, with the testator of the other appellee as surety, returned an inventory, and filed two annual accounts. On presentation of the second account, in March, 1861, the court refused to receive it, and revoked his letters of guardianship, upon the ground that his appointment was void. In April, 1866, a citation was issued to Benjamin C. Earle to make a final settlement. He answered that his appointment was a nullity and his letters had been revoked. The court held him liable. An account which he was compelled to make was restated by direction of the court, and from a decree ordering him to pay the infant a balance he appealed. In the case, Earle v. Crum, 42 Miss. 165, the appellate court decided that the order appointing Benjamin C. Earle guardian was void, and that the proceeding on the final settlement was coram non judice, and dismissed the cause for want of jurisdiction in the probate court of Pontotoc county.

At the February term, 1883, of the circuit court of Pontotoc county, the appellant brought suit on the guardian bond of Benjamin C. Earle against Jeff Wilson, administrator of said Earle, and S. D. Pinson, executrix and sole devisee and legatee of R. A. Pinson, deceased, surety on said guardian bond. The defendants pleaded the general issue, and S. D. Pinson also pleaded that at the death of her testator she was, and had been ever since, a resident of the state of Tennessee; that she took out her letters testamentary and qualified as executrix in Tennessee, and had never qualified in this state.

The verdict was for the defendants.

On the trial, the court below excluded from the jury the bond of Earle and Pinson when offered in evidence by the plaintiff. This is assigned for error.[1]

CAMPBELL, C. J., delivered the opinion of the court.

Where no action is maintainable against the principal because of the inherent nullity of the alleged obligation sued on, no action can be

[1] The arguments of counsel have been omitted.

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maintained against sureties on such obligation; for a surety is only bound for the acts of his principal, and, if there were no principal, there could not be a surety. Even after judgment against sureties, they are entitled to be relieved if their principal is discharged for some cause going to the original transaction, and not merely personal to him. Brandt on Suretyship, etc., § 121; Brown v. Bradford, 30 Ga. 927; Hempstead v. Coste, 36 Mo. 437, 88 Am. Dec. 148; Ames v. Maclay, 14 Iowa, 281; Dickason v. Bell, 13 La. Ann. 249; Miller v. Gaskins, Sm. & M. Ch. (Miss.) 524; Beall v. Cochran, 18 Ga. 38.

This results from the accessory character of a surety, whose existence presupposes the existence of a principal for whose acts he is bound.

In Earle v. Crum, 42 Miss. 165, it was adjudicated that Earle was not the legal guardian of the appellant, for want of authority in the probate court to appoint him, and a corollary from this is that the bond he gave, and now sued on, imposed no obligation. Boyd v. Swing, 38 Miss. 182.

The judgment referred to is evidence of its rendition, and of those legal consequences which result from the fact of its rendition, and it shows the discharge of the principal obligor, and is available to the surety as well as to the principal.

The judgment is not an estoppel as between the appellant and the surety, who was not a party to the litigation; but it is conclusive evidence of the fact that the principal was not bound by the bond, and that fact discharges the surety.

Judgment affirmed.[2]

DOUGLASS v. HOWLAND.

(Supreme Court of New York, 1840. 24 Wend. 35.)

This was an action of covenant, tried at the Herkimer Circuit, in November, 1838, before Hon. John Willard, one of the circuit judges.

On the 2d September, 1833, articles of agreement were entered into between the plaintiff and one George W. Bingham, whereby it was mutually agreed that an account should be stated between the members of two mercantile firms which had theretofore existed, and in which Bingham had been a partner; the plaintiff engaging to pay to Bingham such sum as upon such accounting should be found due to him, and Bingham engaging to pay to the plaintiff such sum as should be found due from him. On the same day an instrument in writing,

[2] Accord: Miller v. Gaskins, Smedes & M. Ch. (Miss.) 524 (1843); State v. Coste, 36 Mo. 437, 88 Am. Dec. 148 (1865); Dickason v. Bell, 13 La. Ann. 249 (1858); Brown v. Bradford, 30 Ga. 927 (1860); Gill v. Morris, 11 Heisk (Tenn.) 614, 27 Am. Rep. 744 (1872). Cf. Pothier on Oblig. par. 2, c. 6, § 1; 2 Am. Lead. Cas. 378–457.

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written underneath the articles of agreement, was executed under the hand and seal of the defendant, in these words: "For value received, I do hereby covenant and agree with the above-named Benjamin Douglass that the said George W. Bingham will well and faithfully perform on his part the above agreement." On these instruments the action was brought.

The plaintiff, in declaring, set them forth, and, after averring performance on his part of all the stipulations contained in the agreement on his part to be performed, alleged that Bingham was indebted to the said mercantile firms in the sum of $1,500; that he would not account, or suffer an account to be taken, according to the tenor and effect of the articles of agreement, and wholly refused so to do; that he, the plaintiff, was obliged to and did file a bill in chancery to compel an account; that such proceedings were thereupon had that subsequently a decree was made in the court of chancery, adjudging Bingham to pay to the plaintiff the sum of $836.56, with the interest thereof from 6th August, 1835, together with the costs of the plaintiff to be taxed, and which were subsequently taxed at $200, of all which it was alleged the defendant had notice. He then alleged for breach that the defendant had not caused Bingham to perform, fulfil and keep all things in the articles of agreement contained on the part of Bingham to be performed, fulfilled and kept, although often requested, etc. And so, etc. The defendant pleaded: (1) Non est factum; (2) that Bingham was not indebted to the two mercantile firms in the agreement mentioned.

On the trial of the cause, the plaintiff read in evidence the articles of agreement set forth in the declaration, and offered to read the covenant of the defendant indorsed thereon, which was objected to by the defendant's counsel as being within the statute of frauds, and therefore void. The objection was overruled and the covenant read. The plaintiff then offered in evidence the enrolment of the decree against Bingham, as set forth in the declaration, which was objected to as inadmissible; the defendant in this cause not being a party thereto. The objection was overruled and the decree read, from which it appeared that Bingham put in an answer, that he was decreed to pay the sum mentioned in the declaration, and that the costs were taxed at $184.12. The plaintiff also read in evidence an exemplification of an execution issued upon the decree and a return of nulla bona, etc. Upon this evidence the plaintiff rested.

The defendant's counsel moved for a non-suit, upon the grounds: (1) That the covenant, not expressing any consideration, was within the statute of frauds and void, although under seal; (2) that the decree was not proper evidence to charge the defendant, he not being a party to the suit in chancery, and it not having been shown that he had notice of that suit; and (3) that no action would lie until after demand and refusal to pay. The motion was denied. The defendant then offered to prove that Bingham was not indebted to either of the firms

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mentioned in the articles of agreement specified in the declaration. The plaintiff objected and the proof was excluded. The counsel next insisted that the defendant was not liable for the payment of the costs of the suit in chancery; but the judge ruled otherwise, and the jury under his charge found a verdict for the plaintiff for $1,235.07 damages and 6 cents costs. The defendant, having excepted to the various decisions made against him, moved for a new trial on a bill of exceptions.[3]

COWEN, J. * * * Thirdly, it is strenuously insisted, and, as I think it will appear, with great propriety, that the decree was not evidence against the defendant. Standing as it did against Bingham alone, it was certainly not evidence, proprio vigore; and, if receivable at all, it must be on the ground that the defendant has made himself privy to the suit in equity, by his covenant. All those cases, therefore, cited on the argument to show that one man cannot be affected by a judgment or decree against another, who is not privy to it, may be dismissed at once, for all purposes, except as showing the reason why that is so. The objection is that the party sought to be affected had no opportunity to examine witnesses, or in any way litigate the matter in controversy, either originally or by appeal, and may, therefore, be wronged beyond measure, by others proceeding collusively behind his back. 1 Phil. Ev. (Cowen & Hill's Ed.) 321; Case v. Reeve, 14 Johns. 79, 81; Maybee v. Avery, 18 Johns. 352; 1 Stark. Ev. (Am. Ed. 1837) 217.

It is admitted in the books cited, that the verdict is not only evidence against the immediate parties, but against all claiming under them, which very nearly expresses the meaning of the word "privy," when used to signify those persons, off the record, who may be affected to the same extent as if they were parties. It means any one who takes the subject-matter of litigation, after the suit is determined, or, in some cases, while it is pending. He is either a privy in blood, as an heir on whom the estate in litigation descends; a privy in estate, as one who takes by conveyance; or a privy in law, as one who takes a right of dower. 1 Phil. (same edition) 321. In all these cases the reason is obvious. The heir, purchaser, etc., always come in subject to any act or default of the predecessor, by which the title may have been effected. But, subject to this exception, the law is extremely jealous of the rights of all who are not actual parties, even though they may appear and be made so. Thus, in a suit against one of two joint debtors, were it not for the statute making the judgment evidence to a certain extent against the other, it cannot be doubted that the proceeding would be altogether nugatory, for the purpose of establishing the truth of the claim against him, although it might, in a suit for contribution, be received, as every record may, against whatever person

[3] **The arguments of counsel are omitted, and so much of the opinion as deals with the statute of frauds.**

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to prove rem ipsam. 1 Stark. Ev. (Am. Ed. 1837) p. 215. Vid. Deering v. The Earl of Winchelsea, 2 Bos. & Pull. 270.

Come, then, to the surety of a debtor. Suppose the now defendant's name to have been signed to the original covenant of Bingham. If he would not, standing there, have been bound by a suit and judgment against Bingham alone, with what propriety can he be held bound in a like proceeding here? In either case, what is the covenant? That Bingham should account and pay over the balance found due; not that he should, on default, abide any decree in chancery or judgment at law for not accounting. With what propriety can it be said the defendant has incurred a greater liability by a separate guaranty than he would by joining in the covenant? May he not say, when the plaintiff comes with his decree, Non hæc in fœdera veni? Is there anything in the nature of suretyship which, at the common law, gives to this decree the force contended for? By the civil law, he would be bound. 1 Evans' Poth. (Lond. Ed. 1806) 562; Laralde v. Derbigny, 1 La. 85, 91. The reason given by Pothier is thus: "In consequence of the obligation of the surety being dependent upon that of the principal debtor, the surety is regarded as the same party with the principal, with respect to whatever is decided for or against him." Again: "But the surety is allowed to appeal against this judgment, or to form an opposition to it, if it be in the last resort." Here is a reason founded both in the nature of the obligation and the right to litigate the demand. So that, even at the civil law, a decree would be no more than prima facie evidence. At common law, where the guaranty is entirely collateral, as in the principal case, there is neither a right to litigate originally nor to appeal. Had the defendant gone into the court of chancery, he would have been dismissed as an intruder, on an objection by the complainant.

It is true he might so have framed his contract as to have undertaken for the decree, like special bail engaging for their principal; or there may be an express stipulation in pais that the principal shall abide the event of the suit, as in Patton v. Caldwell, 1 Dall. 419, 1 L. Ed. 204. Something of the same nature are bonds of indemnity against actions and cases, as in Duffield v. Scott, 3 T. R. 374. There an action and recovery against the obligee were held conclusive, even without notice, that not being expressly provided for in the bond. A fortiori, where notice has in fact been given. The case most familiar to us is a limit bond, whereof it has been held that notice to indemnitors and a chance to defend shall render the judgment against the obligee conclusive in an action to recover over. Kip v. Brigham, 6 Johns. 158, 159; Id., 7 Johns. 168. Codified, 2 R. S. 254 (2d Ed.) § 52. The same may be said of a warrantor of title. 6 Johns. 159, and cases cited there. The obligation of the sureties in a probate bond, that the administrator shall account, has been construed to mean an accounting in the proper court, and thus the decree has been let in as at least prima facie evidence against them. This is given as the result

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of various South Carolina cases, cited in Cowen & Hill's notes to 1 Phil. Ev. p. 984. Such would it of course be, with all that class of bonds, so numerous in our present system, by which sureties expressly bind themselves that the principal shall abide the event of a suit; as to pay costs, or principal moneys to be recovered, or return goods in replevin, etc. Indeed, it is here plain, from the nature of the agreement, that the surety means to be concluded, always saving the right, as the law must in every case where a suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety.

In Hobbs v. Middletown, 1 J. J. Marsh. 176, 179, the Court of Appeals in Kentucky gave this effect to a judgment against a principal in an administration bond. Whether there be a clause in such a bond, which may, as in South Carolina, be construed specially to bind the surety, does not appear from the case. The court remarked that, "the responsibility of securities being incidental and collateral to that of the principal, a judgment in favor of a creditor, against the administrator, concludes the securities as to the existence and character of the debt thus ascertained, and cannot be questioned or reviewed on the official bond." Of course the court except cases of fraud. Vide, also, Fauntleroy v. Lyle, 5 T. B. Mon. 266. If the remark cited be intended of sureties in general, who engage merely for their principal doing some act in pais, it would go beyond any other case I have seen under the system of the common law.

The doctrine has been denied in an action against the sureties of a sheriff, both in Pennsylvania and Virginia. Carmack v. Commonwealth, 5 Bin. 184; Munford v. Overseers of the Poor of Nottoway, 2 Rand. 313. In State of Ohio v. Colerick, 3 Ham. 487, the judgment was, in such case, holden to be prima facie evidence, impeachable for collusion or mistake. Nearly the same effect seems to be collectible from the cases already cited from the Pennsylvania and Virginia Reports, and other cases in the latter. Jacobs v. Hill, 2 Leigh, 393. In the latter case, even a judgment by voluntary confession was holden to have this effect. The earlier cases in Virginia will be found cited and commented upon in Munford v. Overseers, etc., of Nottoway. These cases, from Ohio, Pennsylvania, and Virginia, hold the distinction, especially those of the two former states, that the judgment is either prima facie or conclusive evidence, according as the surety may or may not have had notice, and an opportunity given him to defend, which, of course, he may do in the name of the principal, with the consent of the plaintiff. In the latter case, nothing is more reasonable. It brings the case to the ground of the civil law, and is, we have seen, countenanced by our own adjudications.

Independent of that, however, independent of any clause specially binding the surety to pay judgments or decrees against his principal, independent of the identity and right of defense and appeal, which the civil law imputes to and confers upon the surety, it may, with great

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confidence, I should think, be asked, ought the surety to be farther affected than the merest stranger? This question, I perceive, has been answered in the negative even by a court sitting under the civil law system, where the surety did not happen to be in such a posture as subjected him to the general effect of res judicata against the principal, under that system. One had become bound for the plaintiff to indemnify the defendant against loss by an attachment against him, if it should not be prosecuted to effect. It was not, and damages were in a distinct suit recovered against the principal without notice to the surety. In an action against the latter, the court below received the record of recovery as evidence, per se, against him. But on appeal the judgment was reversed; Derbigny, J., remarking: "There is no rule in our laws better understood than that which allows the surety the right of availing himself of the same means of defense (save those that are merely personal) which the principal debtor could resort to. That principle is founded on the sacred maxim that no one ought to be condemned without being heard, and that consequently no person shall be bound by a judgment to which he is not a party." Lartegue v. Baldwin, 5 Mart. (La.) 193. In this case, too, the record had been received by consent. But to that the learned judge gave the answer that it was admissible for the purpose of showing the principal had been sued, and an execution against him had proved unavailable, but that the judge a quo had improperly allowed to it any farther effect. For the purpose of proving the damages sustained, it was held entirely incompetent—no notice having been given, or opportunity for defense extended, to the then defendant.

This seems to us the reasonable distinction. In general it imposes no hardship on the plaintiff. He has but to serve a notice, with a consent that the surety may take up the defense, and hold all the rights of the principal in that respect, so far as the defense by a surety is admissible. In some cases, as is well known, it may be wider than that of the principal, as where time may have been improperly given by the creditor, or the claim is, in character, without the terms of the bond. The case which occurs to me is a debt charged against one as administrator, which is in fact due from him as an individual. It will, of course, be narrowed, where the defense of the principal is personal, as being founded on infancy or an insolvent discharge. In the very case before us, I perceive that the account of Bingham was agreed by the articles between him and the plaintiff to be adjusted on certain specified principles. Whether more confined than those upon which the court of chancery proceeds it is not necessary to inquire, though I imagine it would not be difficult to show that, in some aspects of the matter, the agreed principles were more confined. How are we to know, from the sweeping evidence of the decree, that the stipulated measure of the account may not have been entirely overgone?

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But I forbear to pursue the farther examination of the question upon principle; and I do it the rather because I perceive the very point has been decided, after an examination which seems to me entirely satisfactory, by two learned courts, one in Maryland and the other in North Carolina. Beal v. Beck, 3 Har. & McH. 242; McKellar v. Bowell, 11 N. C. 34. The first was an action on a bond for the faithful performance of a deputy sheriff, who had been sued and a recovery had against him alone in a defended suit. On this being followed by an action against the surety, the recovery was held by the Court of Appeals not admissible in evidence against him. The argument of the court is not given.

The latter case was an action against a surety on his bond conditioned for the faithful performance of his principal as guardian. A decree had passed against his principal's administrator, in the probate court, on a petition for an account, answer, and proofs taken. The decree was de bonis intestati, and had been followed by a fi. fa. and return of nulla bona. These proceedings were offered in evidence at nisi prius, as prima facie evidence in the suit against the surety, but rejected, and the plaintiff non-suited. A motion at the bar of the Supreme Court, to set aside the non-suit, was denied. The cause appears by Mr. Hawks' report to have been well argued; and Chief Justice Taylor, who delivered the leading opinion, based the decision on a full consideration of the English cases as they then stood, and their grounds as compared with the reason of civil law for coming to a different decision. The authority of the case in this court decided on a limit bond is reviewed, and not disapproved, merely because notice was there given. The opinion of Hall, J., in the same case is a very handsome summary of the arguments bearing upon the question.

Both the learned judges advert to the analogy which repudiates the admissions of the principal as evidence when offered to affect his surety. How perfectly well settled that notion is, both at Westminster Hall and by a majority of the American courts, where the admission is not a part of the res gestæ, I have endeavored to show in Cowen & Hill's note, 1 Phil. 485, p. 669.

I do not deny what was said at the bar, that, had Bingham voluntarily accounted on the principle prescribed by his covenant, the surety would have been liable for the balance struck. The striking of such a balance would be an admission making part of the res gestæ. Indeed, that, and every act leading to or connected with it, would be the res gestæ themselves, for which the defendant undertook in his covenant. The distinction will be found fully presented and illustrated by the cases cited in the note to which I have just referred.

It follows, a fortiori, from what has been already said, that the remaining grounds taken at the circuit, and repeated at the bar, are more than sustained. These are that, at most, the decree was prima facie evidence; that the defendant should have been allowed to show, under

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the second plea, that his principal was in fact never liable; and that the defendant was at all events not liable for the costs of a chancery suit, litigated without his being in any way privy to it, or having had a chance to defend.

That a surety, upon a general undertaking for his principal's paying a debt, can be made liable in any way for the costs of a suit against the latter solely, seems to be a somewhat extraordinary position. A man indorses a note, or signs a guaranty for payment, not of costs, but the debt; what authority has any court for adding costs to the words of such a contract? The case at bar is nothing more in principle. Bingham covenanted to account and pay the balance. He owed two things; the accounting and paying. These made the debt. The defendant covenants that Bingham shall perform both; in other words, discharge his debt, not that he should pay costs. The latter obligation is without the bond. Knight v. Hughes, Mood. & Malk. 244, has some bearing in its principle; Lord Tenterden, C. J. The distinction is well illustrated by a common bond of indemnity, which you take against actions. There the obligor would doubtless be liable for costs, because they are directly incident to the action. They are virtually expressed by the bond. And yet for more abundant caution, costs are usually added; such was the case of Duffield v. Scott, 3 T. R. 374.

A new trial is granted, the costs to abide the event.[4]

[4] In accord with and citing the principal case, Clark v. Montgomery, 23 Barb. 464 (1856), applied its doctrine by rejecting the judgment against a guardian for breach of his duty. The principal case was distinguished in Jackson v. Griswold, 4 Hill, 522 (1842), by Cowen, J., from cases where the surety actively participates in defending the suit for his principal. In Moss v. McCullough, 5 Hill, 131 (1843), it was held the judgment against the principal ought to have been allowed to be impeached; Cowen, J., saying that no effect should have been given to the judgment "beyond its mere existence to fulfill the condition on which the defendant consented to be chargeable." Bronson, J., thought the judgment neither conclusive nor prima facie evidence.

In accord with the principal case is also Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647 (1859).

Pierpoint v. McGuire, 13 Misc. Rep. 70, 34 N. Y. Supp. 150 (Com. Pl. 1895), held a verdict against the surety maintainable on the unrebutted evidence of the prior judgment.

In Maryland, the court, though professing to follow the doctrine that the judgment is only prima facie evidence against the surety, holds him bound by the result. Parr v. State, 71 Md. 220, 17 Atl. 1020 (1889).

In accord: Ex parte Young, 17 L. R. Ch. D. 668 (1881).

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GILTINAN v. STRONG.

(Supreme Court of Pennsylvania, 1870. 64 Pa. 242.)

February 14, 1870, before READ, AGNEW, SHARSWOOD, and WILLIAMS, JJ.

Error to the District Court of Philadelphia; No. 203, to July Term, 1869. Before Thompson, C. J., at nisi prius.

Catharine Strong brought an action of assumpsit in the district court of Philadelphia, to December term, 1866, against David Giltinan. The first count of the declaration was, in consideration that the plaintiff, at the defendant's request, would let to George R. Maguire a house for one year, at $1,200 per annum, the defendant in writing promised that he would pay the rent if Maguire did not; that the plaintiff rented to Maguire, who did not pay. Second count was that, if the plaintiff would let the house to Maguire, the defendant promised to pay the rent; also the common counts.[5] * * *

The opinion of the court was delivered, March 3, 1870, by

AGNEW, J. * * * But we think the court erred in holding that the record of the judgment against Maguire was competent evidence against Giltinan. If the liability is direct and primary it is clear this is so, and if the writing is viewed as a mere undertaking of suretyship still it was error. Giltinan was no party to that action, had no notice to defend it, and could not be brought into defense of it by the plaintiff. The plaintiff's remedy against him could be only on his own promise. A surety may give notice to his principal, who owes him this duty to defend him; but it would be a novelty if the principal could call in his surety, who owes no such duty, to defend him. Giltinan was therefore in no sense either a party or privy to that action. Under the term "parties," says Mr. Greenleaf, in his Law of Evidence (section 524) "the law includes all who were directly interested in the subject-matter, and had a right to make defense or to control the proceeding, and to appeal from the judgment. The right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the cause." A surety in a separate and independent instrument is no party who could appear and control the separate action against his principal or appeal from the judgment.

Nor is there a legal privity. Privity, says Mr. Greenleaf (section 189), denotes mutual or successive relationship to the same right of property. In none of the classes enumerated, as in estate, in blood, and in law, does the case of a surety fall in reference to a creditor's action. It is the right to represent, which creates privity in law as be-

[5] The remaining facts of importance appearing sufficiently in the opinion, the statement of them has been abridged. The arguments of counsel are omitted, and also the portion of the opinion as to the sufficiency of the document sued on.

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tween ancestor and heir, decedent and administrator, etc.; but clearly the principal, in an action against himself alone, cannot represent his surety. If he could, then he could bind his surety for an extinguished or paid debt by a confession or a default. The privity of the surety with his principal is in the contract alone, and not in the action. For the acts or omissions of the principal to which the surety pledges himself in his contract he is bound, and it is only in this respect the principal represents his surety. This is the criterion of the competency of the principal's declarations or admissions. Where these form a part of the acts or omissions of the principal for which the surety is bound, they constitute portions of the res gestæ, and may be evidence against the surety. But beyond this line clearly the surety cannot be affected by the acts or admissions of his principal, for he is not represented by him. 1 Greenleaf's Ev. § 187. The acts or omissions, or admissions of the principal in an action at law against himself, clearly do not represent the surety in any wise.

The liability of the surety is only for the unpaid rent in this case. Now, clearly, the principal cannot, by any act, admission or omission in such action, increase the surety's liability beyond that extent. Nor are the interests of the principal and surety always identical. If the interest of the principal induce him to withdraw a payment made to the rent and apply it to another debt, the judgment against the principal would not represent the true balance against the surety. In the very case before us the payments proved would reduce the judgment against the principal more than $100. If we analyze the judgment, we discover that it cannot affect the surety. It speaks simply the voice of the evidence, and is but the determination of the tribunal of the result of the evidence. But clearly the principal does not represent his surety in marshaling and controlling the evidence. His interest, we have seen, may be different from that of his surety, and induce him to withhold evidence to which the surety would be entitled.

No argument can be drawn from the cases founded on official bonds, bonds of indemnity, etc. They arise from the terms of the bond, or terms of the indemnity, whereby the surety submits himself to the acts of the principal and to the judgment, as itself a legal consequence, falling within the scope of the suretyship. Such are the cases of Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668; Musselman v. Commonwealth, 7 Pa. 240; Commonwealth v. Evans, 1 Watts, 437; and others of similar character.[6] The dis-

[6] Methodist Churches of New York v. Barker, 18 N. Y. 463 (1858), the surety on an injunction bond after a judgment against the principal held to be "concluded by the force and effect of the contract"; Towle v. Towle, 46 N. H. 431 (1866), surety on injunction bond; Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94 (1851), bail; State ex rel. Brown v. Pike, 74 N. C. 531 (1876), surety on administrator's bond; Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036 (1870); Mitchell v. Toole, 63 Ga. 93 (1879), surety of claimant on damage bond; Ruggles v. Bernstein, 188 Mass. 232, 74 N. E.

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senting opinion of Gibson, J., in Masser v. Strickland, while ineffectual against the peculiar terms of a constable's bond, is conclusive as an argument against the competency of the judgment as evidence in an ordinary case of suretyship. If we look for decisions more germane to the present case, we shall find them in Carmack v. Commonwealth, 5 Bin. 184, and Moore's Appeal, 34 Pa. 411. See, also, 1 Greenleaf, §§ 522, 523, 524.

We think the court erred, therefore, in admitting the judgment against Maguire as competent evidence against Giltinan of the sum due upon the rent.

Judgment reversed, and a venire de novo awarded.[7]

366 (1905), post, p. 590. But not where the judgment is obtained on a plea of bankruptcy. Elder v. Prussing, 101 Ill. App. 655 (1902).

[7] The strong dissenting opinion of Gibson, C. J., in Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668 (1828), should be read in connection with the decision in the principal case.

The rule in the above jurisdiction is, however, subject to special contract. McMicken v. Commonwealth, 58 Pa. 213 (1868); Carmack v. Commonwealth, 5 Bin. 184 (1812).

Accord with the principal case: De Greiff v. Wilson, 30 N. J. Eq. 435 (1879); Lucas v. Governor, 6 Ala. 826 (1844); Hobson v. Yancey, 2 Grat. (Va.) 73 (1845); McConnell v. Poor, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312 (1901).

There are numerous jurisdictions which occupy a middle ground, neither wholly excluding the prior judgment (as in the principal case), nor holding that the prior judgment is conclusive evidence as in the cases of court bonds mentioned in note 6, supra.

Thus in many jurisdictions the prior judgment is allowed to be introduced as evidence, and if no opposing evidence is adduced, a verdict may stand against the surety if based on no other evidence of the principal's default than the judgment. Furguson v. Glaze, 12 La. Ann. 667 (1856).

Exactly what is meant by those decisions which, admitting in evidence the prior judgment, say that it is "prima facie evidence," is not clearly defined by any harmonious line of authorities. In Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712 (1827), nothing was determined except that the exclusion of the judgment was error. As to what extent the judgment, if admitted, was conclusive, if at all, was not decided in that case, nor in Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249 (1881), nor in Macready v. Schenck, 41 La. Ann. 456, 6 South. 517 (1889), nor in Leppert v. Flaggs, 101 Md. 71, 60 Atl. 450 (1905), nor in Bradwell v. Spencer, 16 Ga. 578 (1855), nor in Whitehead v. Woolfolk, 3 La. Ann. 42 (1848).

Apart from these cases of doubtful meaning, there are, however, others where the surety has been permitted to offer evidence in rebuttal of the judgment and to show the following facts: E. g., non-liability of the principal. Fay v. Edmiston, 25 Kan. 439 (1881); a defense of counterclaim for damages unsuccessfully made by principal in prior suit, Park v. Ensign, 66 Kan. 50, 71 Pac. 230, 97 Am. St. Rep. 352 (1903).

In Weaver v. Thornton, 63 Ga. 655 (1879), a judgment by an ordinary against the principal was held not to be conclusive, but was allowed to be rebutted as to amount of principal's liability in an action against his surety. So evidence of the satisfaction of a judgment against the principal may be rebutted by the creditor in the subsequent suit against the surety. State v. Martin, 20 Ark. 629 (1859).

In Crawford v. Word, 7 Ga. 445 (1849), it was decided that a sheriff's sureties "will be entitled to make any defense which the sheriff himself could have made." And so of the sureties of an administrator. Bennett v. Graham, 71 Ga. 211 (1883). In Atkins v. Baily, 9 Yerg. (Tenn.) 111 (1836), sureties of a constable were permitted to show notwithstanding a judgment against him, that the money was received by him after his res-

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RUGGLES v. BERNSTEIN et al.

(Supreme Judicial Court of Massachusetts, 1905. 188 Mass. 232, 74 N. E. 366.)

Contract, on a bond to dissolve a mechanic's lien. Writ in the Police Court of Chelsea, dated July 15, 1903.

On appeal to the superior court, the case was heard by Aiken, J., without a jury. It appeared that, the plaintiff having filed a petition in the police court of Chelsea to enforce a mechanic's lien, the defendant Rosa Bernstein, as principal, and the defendants Bessie Aronberg and Horatio F. Twombly, as sureties, on March 5, 1903, executed the bond to the plaintiff to dissolve the lien. Upon the original petition counsel appeared for the respondent Bernstein, who subse quently was defaulted, and on a hearing, on June 12, 1903, the lien was established in the sum of $450.50 damages, and $13.82 costs. At that hearing Bernstein was not present in person nor by counsel. Bernstein not having paid the plaintiff the amount named within 30 days after final judgment thereon, the plaintiff began the present action upon the bond in the police court, and on September 11, 1903, obtained judgment by default in the sum of $464.32 as damages and $16.32 costs, from which judgment the defendant Twombly appealed, bringing the case to the superior court. In that court the defendants were defaulted, and the judge after default assessed damages in the penal sum of the bond, $1,000, and heard the parties upon the question of the amount for which execution should be awarded.

The defendant Twombly, under Rev. Laws, c. 177, §10, offered evidence to prove that the original petition brought to enforce the mechanic's lien could not be maintained by reason of the fact that the debt due the petitioner was a contract price under an entire contract, that the contract never had been performed by the petitioner, that no statement ever had been filed properly covering this debt, and that the statement filed was prematurely filed, and was not in accordance with the statute, and also offered evidence to prove that, if the petitioner could establish a lien for any amount, the principal defendant, Bernstein, had made substantial payments to the plaintiff on account of the work performed under the contract before the

ignation; but this was, of course, a defense peculiar to the surety. The rejection of rebutting evidence as to the non-liability of a sheriff against whom judgment had been recovered was held error in Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647 (1859). So the surety of an administrator may rebut the judgment as to his liability. Commonwealth v. Bracken (Ky.) 32 S. W. 609 (1895). See, also, Jenkins v. State, 76 Md. 255, 23 Atl. 608, 790 (1892).

Some courts, however, lean toward a restriction of the evidence in rebuttal to "collusion, fraud, that demand has been paid, that there has been a clerical mistake in entering up judgment." Dictum in Berger v. Williams, Fed. Cas. No. 1341 (1849), and another dictum in Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 378 (1863).

On judgments against principal, how far evidence against surety, see note, 14 H. L. R. 304.

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statement was filed, for which no credit was given the principal defendant in the statement, and also offered evidence to prove that at the hearing in the police court, when the lien was established, the principal defendant was not personally present or represented by counsel.

The judge excluded the evidence, and awarded execution to issue for the sum of $500.13. The defendant Twombly alleged exceptions.

HAMMOND, J. The evidence excluded related to defenses which could have been set up in the original action. No fraud or collusion being shown, the judgment rendered against the principal was conclusive evidence of the debt thereby ascertained, both against her and against the surety. Cutter v. Evans, 115 Mass. 27; Way v. Lewis, 115 Mass. 26, and cases there cited.

Exceptions overruled.

HENRY et al. v. HELDMAIER.

(Supreme Court of Illinois, 1907. 226 Ill. 152, 80 N. E. 705.)

Appeal from Appellate Court, Second District; heard in that court on appeal from the Circuit Court of Will County, where Hon. Dorrance Dibell, Judge, presided.

On February 8, 1899, J. C. Regan and John F. Quinn entered into a written contract with Ernst Heldmaier for the performance of certain work on the sanitary canal therein described. The work was to be done under the direction and to the satisfaction of the engineer of the sanitary district. Time was of the essence of the contract, and Regan and Quinn were to maintain on the work sufficient workmen and machinery to perform in each and every month the full pro rata of the work agreed upon, which was to be entirely completed by September 1, 1899. Upon notice that a sufficient number of men were not upon the work, they were to immediately increase the number, and upon the failure to keep any of the terms of the contract Heldmaier was, by the giving of prior notice, to have the right to take possession of the work already done, and hire other parties to complete the contract and charge any excess of cost over the stipulated price to Regan and Quinn, who agreed to furnish a bond, with surety, in the sum of $7,500 which amount it was agreed should, upon violation of the terms of the contract, be liquidated damages, and not in the nature of a penalty. The bond as specified was executed on the same day of the contract and signed by Jacob A. Henry and Werden Buck, appellants herein, as sureties. The condition of the bond was, if Regan and Quinn should well and truly keep and perform the contract in the time and manner therein described, then the obligation should be void, otherwise to remain in full force and virtue.

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Regan and Quinn did not keep and perform the contract in the manner specified, and, on August 17th, Heldmaier took possession of the work and completed the contract at a cost of $30,000 in excess of the contract price. Afterwards Regan and Quinn filed their bill in equity in the circuit court of Will county against Heldmaier and one George M. Campbell, setting up the agreement of February 8, 1899, between Heldmaier and themselves, and alleging that they entered upon the performance of the contract, and that on August 17, 1899, while they were engaged in the work therein described, Heldmaier, without notice to them, took possession of their machinery and tools and retained possession of the same. The prayer was for an accounting and judgment for the value of the things so taken possession of. Heldmaier answered the bill, and also filed a cross-bill, setting up the contract and bond, alleging that Regan and Quinn entered upon the work and made default therein, and that the chief engineer several times decided that the work done by them did not comply with the contract, and on several occasions demands in writing were made upon them to comply with the contract; that they failed and refused to do so, and on August 16th a written notice was served upon Henry and Buck, the sureties on the bond, that Regan and Quinn had made default, and upon their failure to comply with the contract and notices Heldmaier had taken possession and completed the contract, and that by reason thereof Heldmaier had suffered damages to the extent of $28,249.33. The cross-bill made Henry, Buck, Regan and Quinn parties defendant, and prayed for an accounting of the whole transaction. Regan and Quinn filed their answer and Henry and Buck demurred to the cross-bill and the same was dismissed as to them. Upon a hearing on bill and cross-bill a decree was entered in accordance with the prayer of the cross-bill, to the effect that Regan and Quinn had failed to comply with the terms of the contract, and pursuant to an accounting before a master Regan and Quinn were decreed to pay Heldmaier $25,526.25.

At the September term, 1903, of the circuit court of Will county, Heldmaier began this action of debt against Regan, Quinn, Henry, and Buck upon the bond of February 8, 1899. The declaration consisted of one amended count setting up the facts as above stated, and alleging that the decree for $25,526.25 rendered by the circuit court of Will county was still in full force, not reversed, appealed from, or set aside. Appellants demurred both generally and specially to the declaration as amended, which demurrer was overruled. They elected to abide by the demurrer, and a default nil dicit was entered, damages assessed by the court, and judgment rendered for the penalty of the bond in debt and damages in the sum of $7,500 which judgment has been affirmed by the Appellate Court, and a further appeal prosecuted to this court.

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Mr. Justice WILKIN delivered the opinion of the court.

The first question is as to the sufficiency of the amended declaration. It is insisted that the declaration is double, and that the cause of action therein stated is based not only upon the bond, but also upon the judgment rendered in the chancery case. Duplicity in a declaration consists in joining in one and the same count different grounds of action of different natures, or of the same nature, to enforce only a single right of recovery. Chicago West Division Railway Co. v. Ingraham, 131 Ill. 659, 23 N. E. 350. We do not think the claim of duplicity can be maintained against the declaration in this case. It sets out the bond and also the contract which the bond was given to secure, and avers a breach of that contract. While it goes farther, and sets out the pleading and decree in the chancery case, that is not done for the purpose of setting up other and different causes of action from that on the bond and contract, but for the purpose of showing that the principals on the bond have had their day in court and the damages upon the breach have been established at least against them. It would clearly not be sufficient to set up the bond and allege nothing as to the contract or the breach of it. If the bond had been executed, and no contract entered into for the performance of labor, and no breach of that contract, there could have been no breach of the bond, and so the declaration properly alleged, not only the execution of the bond and contract and the subsequent breach thereof, but also that the damages under the breach had been established and adjudicated as against the principals in the bond. The proceedings in the chancery case are set out possibly with greater fullness than was actually necessary, but the declaration, taken as a whole, is directly upon the bond and for the breach of the contract and was therefore not double, and the court committed no error in so holding.

The contract provided that Regan and Quinn should maintain on the work sufficient material and workmen to perform in each and every month the full pro rata part of the work, and that upon notice from Heldmaier that there was not a sufficient number of men or machinery upon the work, Regan and Quinn would forthwith increase the force or machinery. It is insisted that this notice was a condition precedent to declaring the contract forfeited, and the declaration should allege the giving of such notice, and in the absence of such averment the declaration is subject to general demurrer. As we before said, the declaration sets up the bond, contract and chancery proceeding. In the latter the cross-bill alleged that Regan and Quinn were repeatedly notified in writing that the work was not being done according to the contract, and they were requested to provide more men and equipment, which they failed to do, and, as a result, Heldmaier took possession of the work. The decree found the specific allegations of the bill to be true as therein specified, and made

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specific findings thereon. These allegations and findings were set up in full in the declaration in this case, and constituted a sufficient allegation as to notice to Regan and Quinn to comply with the terms of the contract. The sureties on the bond were not entitled to any notice. The contract merely provided for notice to the principals. The bond said nothing about notice, but the sureties therein bound themselves to respond to any damages for the breach of the contract.

It is again insisted that if it was intended to state a cause of action in the declaration by setting out the proceedings and decree in the chancery suit such statement is defective, for the reason that it does not allege that the decree, at the time this suit was commenced, had not been performed and was unpaid. As before said, the cause of action was not upon the decree but upon the bond, and the chancery proceeding was set up only for the purpose of showing that the principals on the bond had been heard or had an opportunity of being heard in court, and judgment had been rendered against them. But even if this was not true, the declaration alleged that the decree was in full force and effect, not reversed, appealed from, or set aside. This statement was equivalent to an allegation that the decree had not been performed or paid. 11 Ency. of Pl. & Pr. 1145.

To the amended declaration appellants demurred, which demurrer was overruled. They elected to stand by the demurrer, and judgment was entered against them. For the purpose of proving the amount due upon the bond, and for which judgment should be rendered, appellee offered in evidence the decree in the chancery case which formed the basis of the judgment. It is earnestly insisted by appellants that while the decree might have been a sufficient basis for a judgment against the principals on the bond it was not sufficient as against the sureties, for the reason that they were not parties to the decree, were not bound thereby and never had their day in court on that issue. This raises the question to what extent a judgment against the principal may be introduced in evidence against sureties and how far it is binding against them. This has been a matter of discussion before the various courts of this and other countries, and there seems to be more or less conflict of opinion on the subject.

Some courts hold that a judgment against the principal is prima facie evidence against the surety, but they differ as to the character of the proof required to overcome the prima facie case, some announcing the rule to be that to avoid the effect of the judgment the surety must show fraud, collusion, mistake, or payment; others, that the surety has the right to go behind the judgment against the principal and make any defense to it which he might have made if he had been a party to the suit; still others hold that the judgment is conclusive evidence against the surety. But the cases are distinguishable from ordinary cases in that the contract of the surety obligates

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him to be responsible for the result of a suit against his principal, or where he has been privy to the suit against the principal by notice and has been given an opportunity to defend himself. For a citation of authorities as to these different rules, see Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248. In the American and English Encyclopedia of Law (volume 27, p. 455) the rule is announced as follows: "It is generally held that a judgment against a principal is not conclusive, but only prima facie evidence against his surety to show a breach of contract and liability unless the condition of the bond makes it conclusive."

This court on several occasions since the decision in the Grommes Case has been called upon to announce the rule. In Wanack v. People, 187 Ill. 116, 58 N. E. 242, a judgment had been rendered against a saloon keeper and the owner of the building, under the dramshop act, for causing the death of one John Alexander. Suit was subsequently brought upon the bond of the saloon keeper, and the question was as to the extent to which the judgment against the saloon keeper and owner of the building was evidence against bondsmen. On page 122 of 187 Ill. and page 244 of 58 N. E., we said: "The rule seems to be well settled that a judgment against the principal upon official bonds and bonds by parties to suits, and proceedings in court or relating to the result of a suit or proceeding, is conclusive upon the surety. Whether or not the same rule applies in suits upon bonds like the one here involved the authorities are not altogether harmonious; but we think the weight of authority and sound reasoning is in favor of the proposition that a judgment against the principal, especially where the surety has been notified and had an opportunity to defend, is prima facie evidence as to the amount of damages in a suit against the surety." In Meyer v. Purcell, 214 Ill. 62, 64, 73 N. E. 392, we said: "Where a person is responsible over to another, and he is notified of the pendency of a suit involving the subject-matter of the indemnity, his liability will be fixed and determined by the judgment rendered therein, and notice to him will be implied where he has knowledge of the pendency of the suit and participates in the defense thereof." To the same effect, see Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354. From these authorities we think the rule in this state is that where the sureties have had notice of the pendency of the suit, the judgment rendered against the principal is prima facie evidence against the sureties.

It is insisted, however, by appellants, that the cases thus cited are each upon a different state of facts from this case, and that those cases do not announce the rule which should be applied here. It is true, the cases cited are not exactly similar in their facts to the one at bar, but we think they announce correct principles which should govern this case. The record in the chancery case shows that the sureties on the bond were made parties defendant to the cross-bill

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of Heldmaier. Summons was issued against them and they appeared in court and filed a demurrer to the cross-bill, and the suit was subsequently dismissed as to them. This was sufficient notice to give them an opportunity to defend in that suit if they saw fit. The cross-bill set up the bond and contract and alleged a breach. The sureties knew, or were chargeable with knowledge, that if judgment was rendered against the principals they would be liable on their bond for the payment of the same to the extent of the amount therein named. If they had any defense it was their duty to appear and protect their rights. When they demurred to the amended declaration in this case and the same was overruled they saw fit to stand by their demurrer, and the decree in the chancery case was prima facie evidence of the amount due upon the bond as against the sureties, and the circuit court committed no error in so holding.

We find no reversible error, and the judgment will be affirmed.

Judgment affirmed.

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INDEX

ACCEPTANCE, Page
Of offer to become surety or guarantor, see Formation, 4.

ACTION,
Form of, upon a surety or guarantor's undertaking, see.....121, n. 8
By surety against principal, see Reimbursement.
By surety against co-surety, see Contribution.

ALTERATION,
See Defences, VIII.

ASSENT,
See Formation, 4.

ASSIGNEE,
Of surety. subrogation in favor of, see Subrogation.

ASSIGNMENT,
Of debt by creditor, see Statute of Frauds, 6.

BANKRUPTCY,
Discharge in bankruptcy of principal, whether a defence for surety, see Defences, XIII.
Discharge of co-surety in, as defence to suit for contribution, see Contribution, 8.
Discharge of principal in bankruptcy as defence to surety's action for reimbursement, see Reimbursement.

BILATERAL CONTRACTS,
Of suretyship, see Formation, 4.

BILLS AND NOTES,
Application of suretyship to, see Formation, 6.

BOOK ENTRIES,
Of creditor as evidence to prove party to whom credit was given, see Statute of Frauds.

CAPACITY,
Of principal, see Formation, 7.

COLLATERAL,
Held by creditor, whether must be exhausted before suing surety, see Defences, VII (2).
Held by surety, whether must be exhausted before action for reimbursement lies, see Reimbursement.
Distinguished from original undertakings, see Statute of Frauds.
As to which subrogation exists, see Subrogation.

COMPOSITION AGREEMENTS,
See Defences of Surety against Creditor, IV.

CONCEALMENT,
See Formation, 8.

CONDITIONS PRECEDENT,
See Formation, 11.

CONSENT,
See Formation, 4.

CONSIDERATION,
In simple contracts of suretyship, see Formation, 2, 3.

Digitized by Google

CO-SURETY, Page
See Contribution.
CONTINUING GUARANTIES,
See Formation, 4.
CONTRIBUTION,
1. When right arises,
Cooke v. ——— 326
2. Presumption as to extent of liability of co-sureties inter se,
Harrison v. Lane 343
3. In case of insolvency of one or more sureties,
Hole v. Harrison 325
Gross v. Davis 348
4. Whether right depends upon insolvency of principal being first established,
Rainey v. Yarborough 326
Lawson v. Wright 341
Sloo v. Pool 330
Acers v. Curtis 332
How far enforceable at law,
Kemp v. Finden 328
Robinson v. Kenon's Ex'r 339
Mackreth v. Walmesley 351
Michael v. Allbright 356
5. Speculation between co-sureties,
Acers v. Curtis 332
Labbe v. Bernard 339
6. Defences of the co-surety,
Statute of limitations,
Chipman v. Morrill 334
Durbin v. Kuney 338
7. Duty of disclosure,
Mackreth v. Walmesley 351
8. Bankruptcy,
Liddell v. Wiswell 357
Whether demand must precede suit,
Chaffee v. Jones 360
COUNTER-SECURITY,
See Contribution, 5.
COVERTURE,
Of principal, see Formation, 7.
CREDITOR,
Subrogation in favor of, see Subrogation.
Right of surety to collateral held by creditor, see Subrogation.
Right of creditor to collateral held by surety, see Subrogation.
DEATH,
Of surety, see Defences, II.
Of principal, see Defences, III.
DEFENCES OF SURETY AGAINST CREDITOR,
I. Defences arising out of the joint nature of the contract,
Rawstone v. Parr 363
Collins v. Griffith 362
Harrison v. Field 365
Winslow v. Parkhurst's Heirs 368
Local statutes affecting joint liability ..... 367, n. 5

Digitized by Google

DEFENCES OF SURETY AGAINST CREDITOR—Continued, Page
II. Death of the surety,
Saymond v. Gent..... 369
In re Crace..... 372
Royal Ins. Co. v. Davies..... 378
Knotts v. Butler..... 376
Dodd v. Whelan..... 369
Gay v. Ward..... 383
Calvert v. Gordon..... 381
III. Death of principal,
Davidson v. Taylor..... 392
Legate v. Marr..... 393
Nelson v. Anderson..... 391
Gargan v. School Dist..... 394
Bank v. Barrington..... 398
IV. Satisfaction or payment by principal,
Bancrofte v. Willet..... 402
Merrimack Bank v. Parker..... 402
Tender,
Johnson v. Mills..... 404
Ruble v. Norman..... 405
Release of principal,
Ex parte Glendinning.....408; 409, n. 2; 468
V. Set-off or counterclaim,
Waterman v. Clark..... 412
Banks v. Pike..... 418
Hollister v. Davis.....417, n. 5
Bechervaise v. Lewis.....424, n. 10
Lasher v. Williamson..... 417
Graff v. Kahn..... 414
Armstrong v. Warner..... 419
VI. Duty of creditor to pursue principal,
Moussa v. Loterijman..... 425
Suretyship contrasted with guaranty of collection.....425, n. 2
VII. Defences based on transactions between creditor and principal 426–542
(1) Extension of time to principal.....426–471
Basis for rule discharging surety,
Rees v. Berrington.....426; 431, n. 4
Extent of injury by delay,
Rees v. Berrington..... 426
Boultbee v. Stubbs..... 429
Originally equitable relief given,
Rees v. Berrington..... 426
Devers v. Ross..... 447
In modern times a defence at law.....449, n. 14
Consent of surety to extension,
Hutchinson v. Wright..... 470
Knowledge of surety as to extension,
Stewart's Adm'r v. Parker..... 461
Specialty extended by promissory note,
Rees v. Berrington..... 426
Or by another specialty,
Boultbee v. Stubbs..... 429

Digitized by Google

DEFENCES OF SURETY AGAINST CREDITOR—Continued, Page
Extension must be binding, and not merely inactivity or indulgence,
McLemore v. Powell....432; 431, n. 4
Payment of interest and promises to pay interest,
Dodgson v. Henderson....464; 465, n. 20
Kellogg v. Olmsted.... 435
Bank v. Truesdell.... 437
Bank v. Parsons.... 463
Billington v. Wagoner.... 439
Whether apparent principal in written contract may be shown to be a surety,
Laxton v. Peat....444; 444, n. 10
Hall v. Bank....459; 444, n. 10; 459, n. 16
Overend v. Oriental Co.... 449
Smith v. Shelden....445; 447, n. 13
Extension with reservation of rights,
Bank v. Johnson.... 467
(2) Surrender or loss of collateral,
A pro tanto discharge,
Holland v. Johnson.... 471
Bank v. Hayes.... 479
Everly v. Rice.... 483
Monroe v. De Forest.... 476
Presumption as to extent of loss,
Monroe v. De Forest.... 476
Bank v. Hayes.... 479
Collateral subsequently acquired,
Holland v. Johnson.... 471
Campbell v. Rothwell.... 504
Mt. Sterling Co. v. Cockrell.... 513
Young v. Cleveland.... 515
Parol evidence that apparent principal is surety,
Holland v. Johnson....471; 473, n. 24
Whether duty of creditor is to resort first to collateral,
Bingham v. Mears.... 474
National, etc., Co. v. Montpelier, etc., Co....482; 541, n. 57
Bank v. Wood.... 550
Affirmative duty of creditor to perfect or preserve collateral,
Wulff v. Jay.... 487
Merritt v. Haas.... 508
Board of Com'rs v. Branham.... 491
Mayhew v. Crickett.... 496
Alcock v. Hill.... 500
Surrender of property taken on execution,
Young v. Cleveland.... 515
(3) Variation by principal and creditor of original agreement,
Alteration,
Mersman v. Werges.... 516
Hilliboe v. Warner.... 533
Jackson v. Cooper.... 535
Assent to, by surety....526, n. 42
Addition of new name, whether alteration,
Mersman v. Werges.... 516

Digitized by Google

DEFENCES OF SURETY AGAINST CREDITOR—Continued, Page
Variation by principal and creditor of terms of original agreement,
Zeigler v. Hallahan..... 519
Bethune v. Dozier..... 524
Zimmerman v. Judah..... 530
Taylor v. Scott..... 533
Variation of term as to which surety has not contracted,
Harper v. Ins. Co..... 526
Waiver by surety of variation,
Woodcock v. Ry. Co..... 531
(4) Connivances at breaches of principal's duty not amounting to dishonesty,
Sanderson v. Aston.....536; 538, n. 56
Neglect of creditor to utilize means of payment,
Fegley v. McDonald..... 538
Voss v. Bank.....541; 542, n. 58
IX. Transactions of creditor (or promisee) with surety.
(1) Request of surety to creditor to sue principal,
Croughton v. Duval..... 543
Thompson v. Bowne.....549; 549, n. 2
(2) Failure or neglect to sue principal.
Townsend v. Riddle..... 545
(3) Failure to resort to collateral,
Bank v. Wood.....550; 474; 482; 541, n. 57
(4) Notice that creditor will look only to principal,
Harris v. Brooks..... 554
(5) Misinformation given surety as to state of transactions between principal and creditor,
Brewing Co. v. Mullican..... 556
X. Effect of absence of notice to surety or guarantor of principal's default,
Orme v. Young..... 560
Guarantor of commercial paper,
Philips v. Astling.....561; 564, n. 10
XI. Change in personality of partnership principal,
Lamm v. Colcord.....565; 570, n. 1
XII. Statute of limitations,
When begins to run in surety's favor,
McGovern v. Rectanus..... 571
Effect of statute barring claim against principal,
Nelson v. Bank..... 573
Hooks v. Bank..... 574
Whiting v. Clark..... 575
Effect of part payment by principal,
Whitcomb v. Whiting.....576; 577, n. 8
Cross v. Allen..... 578
Deaton v. Deaton..... 581
Mason v. Kilcourse..... 583
XIII. Discharge of principal in bankruptcy,
Cilley v. Colby..... 585
XIV. Judgments pleaded in bar,
Judgments in favor of principal,
Crum v. Wilson..... 587

Digitized by Google

DEFENCES OF SURETY AGAINST CREDITOR—Continued, Page
Judgments in favor of creditor,
Giltinan v. Strong.....596; 597, n. 6; 598, n. 7
Ruggles v. Bernstein..... 599
Douglass v. Howland.....588; 594, n. 4
Where surety is notified of action,
Henry v. Heldmaier..... 600
DEL CREDERE FACTORSHIP..... 131
DISCLOSURE,
Duty of between creditor and surety, see Formation, 8.
Surety and co-surety, see Contribution, 7.
DURESS,
See Formation, 10.
EXCUSSION,
As duty of surety or guarantor, see Defences, VI; Suretyship.
EXONERATION,
Equity of exoneration arises before payment,
Holcombe v. Fetter..... 212
Saunders v. Churchill..... 200
Beardmore v. Cruttenden..... 201
Ascherson v. Tredegar..... 205
Exists against estate of deceased principal,
Saunders v. Churchill..... 200
Taylor v. Heriot..... 209
Right to compel creditor to sue principal on securing former.
Beardmore v. Cruttenden..... 201
In re Babcock..... 202
Whether bill may be filed after creditor's action,
Hughes, etc., v. Indian, etc., Co..... 214
Scanland v. Settle..... 209
Who should be parties to bill,
Stephenson v. Taverners..... 213
Whether equity arises before maturity of debt.
Hughes, etc., v. Indian, etc., Co..... 214
EXTENSION OF TIME,
To principal as defence for surety, see Defences, VII.
FAILURE,
Or neglect of creditor to sue principal as defence for surety, see Defences, IX (2).
Of creditor to utilize collateral, whether defence for surety, see Defences, IX (3).
FALSE REPRESENTATIONS,
See Fraud.
As to credit of another, see Statute of Frauds, 8.
FORBEARANCE,
To sue principal as a consideration for surety's contract, see Formation, 3.
FORMATION,
1. By specialty,
Y. B. 33 Ed. I..... 1
No consideration.....2, n. 4

Digitized by Google

FORMATION—Continued, Page
Past consideration....2, n. 4
Estoppel from delivery, see Conditions Precedent.
2. By simple contract,
Consideration for suretyships, etc., contemporaneous with principal's contract,
Y. B. 12 Hen. VIII.... 113
Kirby & Eccles Case.... 2
Saline v. Sappington.... 3
Brown v. Garbrey.... 4
3. Consideration for suretyships, etc., as to past debts,
Jordan's Case.... 12
Forbearance a common example of consideration....12, n. 8
Doctrines of consideration applied to simple contracts of suretyship and guaranty....12 to 17
Consideration implies a detriment incurred on request,
Symmons v. Want.... 14
Savage v. Bank.... 21
(Obiter) Polk v. Smedley.... 23
French v. French.... 15
Savage v. Bank.... 21
Consideration consisting of promise of future credit....15, n. 10
Consideration consisting of actual forbearance for a reasonable time on request,
Map v. Sidney....16; 17, n. 14
Crears v. Hunter.... 36
Wynne v. Hughes.... 34
Consideration consisting of money paid surety,
Dutchman v. Tooth....56; 56, n. 41
4. Doctrines of offer and acceptance applied to simple contracts of suretyship and guaranty....18 to 59
Consent necessary,
Bourke v. Buxton.... 25
Downing v. Robinson.... 25
Volunteers not sureties,
Downing v. Robinson.... 25
(Obiter) Polk & Co. v. Smedley.... 23
Overtures distinguished from offers,
Gaunt v. Hill.... 18
Bilateral contracts of suretyship,
Westhead v. Sproson.... 18
(Obiter) Lennox v. Murphy....47; 49, n. 31
Unilateral contracts of suretyship, where acceptance consists of detriment incurred on request (e. g., in giving credit),
Jarvis v. Wilkins.... 22
Oldershaw v. King.... 29
(Obiter) Jordan's Case.... 12
Wynne v. Hughes.... 34
Crears v. Hunter.... 36
Lent v. Padelford.... 42
Notice of acceptance of offer to become surety in unilateral contracts of suretyship,
Somersall v. Barneby....55, n. 39
Jarvis v. Wilkins.... 22
Oldershaw v. King.... 29
Wynne v. Hughes.... 34

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FORMATION—Continued, Page
Crears v. Hunter..... 36
Eddowes v. Niell.....39; 39, n. 2
Lent v. Padelford..... 42
Lennox v. Murphy.....47; 56, n. 40
Davis v. Richards..... 52
Payne v. Ives..... 50
Withdrawal of offer to become surety,
Offord v. Davies..... 58
5. Suretyship in form of joint contract.....5 to 8
Riley v. Jarvis..... 5
City of Phila. v. Reeves.....6; 7, n. 8
6. Suretyship in the form of indorsement or other contracts of the law merchant,
Tanner v. Gude..... 9
Cheney v. Thompson, etc., Co.....11; 10, n. 10
7. Capacity, personal incapacity of principal,
Goodell v. Bates.....60; 60, n. 1; 63, n. 2
Winn v. Sanford..... 61
Robbins v. Robinson..... 63
Dutt v. Adm'r Gen. of Bengal.....66; 66, n. 6
8. Fraud affecting formation of suretyship,
Fraud by creditor upon surety,
Marchman v. Robertson..... 67
Stone v. Compton..... 68
Remington Co. v. Kezertee..... 71
In false representation of collateral fact,
Marchman v. Robertson..... 67
Remington Co. v. Kezertee..... 71
Stone v. Compton..... 68
Whether duty of creditor to disclose material facts.....72, n. 10
Wilmington Co. v. Ling..... 73
Remington Co, v. Kezertee..... 71
Fraud of creditor on principal,
Henry v. Daley.....79; 80, n. 13
Macey v. Heger.....78; 80, n. 13
Fraud of principal on surety,
Ladd v. Board of Trustees..... 81
Page v. Krekey..... 82
9. Effect of illegality,
Denison v. Gibson..... 86
Warren v. Crabtree..... 94
Coles v. Strick..... 90
Swift v. Beers..... 98
Hook v. White..... 97
Mound v. Barker..... 99
10. Duress,
Of creditor on principal,
Huscombe v. Standing..... 100
Bonds to obtain discharge from imprisonment,
Toles v. Adee..... 100
Invalid statutory obligation and valid common-law obligations,
Toles v. Adee..... 100

Digitized by Google

FORMATION—Continued, Page
11. Conditions precedent,
Specialties and parol conditions precedent,
Gwyn v. Patterson..... 109
Bonser v. Cox..... 105
Butler v. U. S..... 107
Morten v. Marshall..... 110

FRAUD,
See Formation, 8.

GUARANTY,
Distinguished from suretyship, see Defences, VI.
Of collection, see Defences, VI.

ILLEGALITY,
See Formation, 9.

INDEBITATUS ASSUMPSIT,
Remedy for surety to obtain reimbursement, see Reimbursement.

INDEMNIFY,
Promises to, whether within the statute of frauds, see Statute of Frauds, 4.

INDORSEMENT,
Suretyship applied to indorsement, see Formation, 6.

INFANCY,
Of principal, see Formation, 7.

INTEREST,
Payment of, whether consideration for extension of time, see Defences, VII (1).

JOINT CONTRACTS,
See Formation, 5; Defences, I.
And statute of frauds, see Statute of Frauds.
Subrogation as to, see Subrogation.

JUDGMENTS,
In favor of creditor against principal, how far admissible against surety, see Defences, XIV.
Pleaded in bar of actions by creditor against surety, see Defences, XIV.
Subrogation as to, see Subrogation.

LIENS,
Subrogation as to, see Subrogation.

MISCARRIAGES OF ANOTHER,
See Statute of Frauds, 9.

MISINFORMATION,
Given surety by creditor concerning transactions with principal, when defence for surety, see Defences, IX (5).

NOTICE,
That creditor will look only to principal, whether a defence for surety, see Defences, IX (4).
By creditor to surety or guarantor of principal's default, when absence thereof is defence for surety, see Defences, X.

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NOTICE—Continued. Page
Of acceptance of offer to become surety or guarantor, see Formation, 4.

NOVATIONS,
See Statute of Frauds, 5.

OFFER AND ACCEPTANCE,
Doctrine of, applied to simple contracts of suretyship, see Formation, 4.

ORIGINAL UNDERTAKINGS,
Distinguished from collateral undertakings, see Statute of Frauds.

OVERTURES,
Distinguished from offers, see Formation, 4.

PAROL EVIDENCE,
When admissible to show suretyship, see Defences, VIII (1) (2).

PARTNERSHIP,
Change in members of partnership (principal debtors) as defence for surety, see Defences, XI.

PAYMENT,
When a defence for surety, see Defences, III.
By surety entitling him to reimbursement by principal, see Reimbursement.

PURCHASERS OF SECURITIES,
Subrogation as to, see Subrogation.

QUASI CONTRACT,
Basis of reimbursement at law, see Reimbursement.

REIMBURSEMENT,
Enforced first in equity,
O'Carroll's Case..... 218
Glossup v. Harrison..... 219
Tinsley v. Oliver's Adm'r..... 219
At law in the action of indebitatus assumpsit,
Decker v. Pope..... 220
Pownal v. Ferrand..... 224
De Lecton v. De Suttona..... 218
When right arises,
Ingalls v. Dennett..... 221
What is payment,
Cornwall v. Gould..... 221
Action upon part payment,
Pownal v. Ferrand..... 224
Craighead v. Swartz..... 227
Whether collateral must first be utilized by surety,
Riddle v. Bowman..... 236
Quasi contractual basis of right shown in
Joint contracts,
Apgar's Adm'rs v. Hiler..... 233
Payment of specialty debts,
Buckner v. Morris..... 239
Speculations at expense of principal,
Gieseke v. Johnson..... 240

Digitized by Google

REIMBURSEMENT—Continued, Page
Defences of principal,
Incapacity,
Davis v. Com'rs..... 242
Illegality,
Harley v. Stapleton's Adm'r..... 250
Statute of limitations,
Angrove v. Tippett..... 232
Effect of running of statute between principal and creditor,
Godfrey v. Rice..... 245
Odlin v. Greenleaf..... 251
Marshall v. Hudson..... 255
Voluntary payment by surety,
Hatchett v. Pegram..... 257
Cahill v. Bigelow..... 253
Brown v. Kidd..... 230
Smith v. Wheeler..... 265
Thayer v. Daniels..... 266
Norton v. Hall..... 261
Principal's discharge in bankruptcy,
Smith v. Wheeler..... 265
Effect of judgments recovered by creditor against surety,
Tarleton v. Tarleton..... 252

RELEASE OF PRINCIPAL,
As defence for surety, see Defences, IV.

REQUEST OF SURETY,
To creditor to sue principal as defence for surety, see Defences, IX (1).

RESERVATION OF REMEDY,
By creditor against surety where
Time is given principal, see Defences, VII (1).
Discharge is given principal, see Defences, IV.

RETENTION OF DISHONEST SERVANT,
By guarantee after notice, see Defences, VIII (2).

SECURITIES,
Subrogation as to, see Subrogation.

SET-OFF,
Of principal's claim as defence for surety, see Defences, V.

SPECIALTY,
Formation of suretyship by specialty, see Formation, 1.
In relation to statute of frauds, see Statute of Frauds.

SPECULATION BY SURETY,
At expense of principal, see Reimbursement.

STATUTE OF FRAUDS,
Distinction between suretyship and other forms of liability with reference to the statute of frauds,
1. Contracts under seal..... 114
2. Promises made by the defendant to the debtor,
Eastwood v. Kenyon..... 112

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STATUTE OF FRAUDS—Continued. Page
3. Promises by defendant to creditor,
(A) At time credit is originally given,
(1) Where the promise is collateral to a debt created against another person,
Y. B. 12 Hen. VIII, fol. 11, pl. 3..... 113
Alford v. Eglisfield..... 115
Ward v. Coggin..... 115
Foster v. Halliman..... 116
Rozer v. Rozer..... 117
Buckmyr v. Darnall..... 119
(2) Where defendant himself becomes the debtor,
Stonehouse v. Bodvil..... 116
Ambrose v. Rowe..... 116
Jordan v. Tompkins..... 122
Austen v. Baker..... 117
Watkins v. Perkins.....118; 121, n. 8
Matson v. Wharam..... 122
Smith v. Miller..... 128
Iona Bank v. Boynton..... 129
Effect of entries in books of creditor,
Austen v. Baker.....117, n. 7
Cooper v. Gibbons..... 130
Joint contracts and statute of frauds.....124, n. 10
Effect of certain expressions,
"I will see him paid,"
Keate v. Temple..... 125
"If you will lend" or "if you will sell,"
Butcher v. Andrews..... 124
"I will answer for the payment of goods sent to him,"
Mines v. Sculthorpe..... 127
(B) Promises to the creditor after the original credit is given or debt created, etc.; i. e., promises to pay pre-existing debts,
Baxter v. Jackson..... 134
Buckley v. Turner..... 134
King v. Wilson..... 135
Harburg Co. v. Martin..... 140
White v. Rintoul.....149; 154, n. 27
Bailey v. Marshall..... 157
Williams v. Leper..... 135
Houlditch v. Milne..... 137
Lamkin v. Palmer..... 155
Hughes v. Lawson.....138; 140, n. 24
Swan v. Nesmith..... 131
4. Promises to indemnify,
Guild v. Conrad.....159; 162, n. 30
5. Novations,
Roe v. Haugh..... 162
Meriden Co. v. Zingsen.....163; 166, n. 31
6. Assignment of original debt by creditor,
Israel v. Douglas.....167; 169, n. 33
Compton v. Jones..... 170
De Barry v. Withers..... 171
Hargraves v. Parsons..... 174

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STATUTE OF FRAUDS—Continued, Page
7. Debts created for benefit of a third party,
Morrison v. Hogue 177
Farley v. Cleveland ..... 178; 182, n. 40
Mason v. Hall 183
Wright v. Smith 186
Berry v. Doremus 186
8. Actions for false representations as to credit of another,
Upton v. Vail 188
9. Promises as to "miscarriages" of another,
Kirkham v. Marter 191

STATUTE OF LIMITATIONS,
In favor of principal against surety, see Reimbursement; Defences of Principal.
In favor of surety, see Defences, XII.
In favor of co-surety against surety, see Contribution, 6.
Distinction between suretyship and guaranty ..... 195, n. 47
Kearnes v. Montgomery 193
Hofheimer v. Losen 196
Duty of excussion in guaranties,
Colby v. Farwell ..... 197; 199, n. 49

SUBROGATION,
Not in favor of volunteer,
Shinn v. Budd 302
Not until full payment,
Musgrave v. Dickson 272
As to collateral of which surety had no knowledge,
Mayhew v. Crickett 496
As to subsequently acquired securities,
Campbell v. Rothwell 504
Holland v. Johnson 471
Peirce v. Garrett 298
Orvis v. Newell 275
As to liens after judgment,
Springer v. Toothaker 511
As to bail subsequently given by principal,
Parsons v. Briddock 270
As to judgment recovered by creditor against principal,
Townsend v. Whitney 292
Croft v. Moore ..... 288; 297, n. 12
Brandon v. Brandon 271
Joint liabilities at common law,
Jones v. Davids 306
Hill v. Kelly 307
Kent v. Canter's Ex'r 309
Ex parte Ware 320
Lumpkin v. Mills 309
Purchasers of the security with notice,
Dixon v. Steel 279
Bank v. Silliman 283
Purchasers of the security without notice,
Orvis v. Newell 275
In favor of assignee of the surety,
Peirce v. Garrett 298

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SUBROGATION—Continued,
In favor of creditor,
First Nat. Bank v. Davis..... 300
Taylor v. Farmers' Bank..... 321

SURETYSHIP,
In form of joint contract, see Formation, 5.
In form of indorsement, etc., see Formation, 6.
Distinguished from guaranty, see Defences, VI.

SURRENDER OR LOSS OF COLLATERAL.
As defence for surety, see Defences, VII (2).

THIRD PARTY,
Debts in favor of, see Statute of Frauds, 7.

TIME,
Giving of, by creditor, whether a defence for surety, see Defences, VII (1).

UNILATERAL CONTRACTS,
Of suretyship, see Formation, 4.

VARIATION.
Of original contract as a defence for surety, see Defences, VIII.

VOLUNTARY PAYMENTS,
By surety, whether basis for reimbursement, see Reimbursement.

VOLUNTEER,
Not a surety, see Formation, 4.

WITHDRAWAL,
Of offer to become surety or guarantor, see Formation, 4.

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